In the Supreme Court of the United States

October Term, 1919

No. 224

COLEMAN J. WARD ET AL., *Petitioner*,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF LOVE COUNTY, OKLAHOMA, *Respondent*,

On Writ of Certiorari to the Supreme Court of Oklahoma.

BRIEF OF RESPONDENT.

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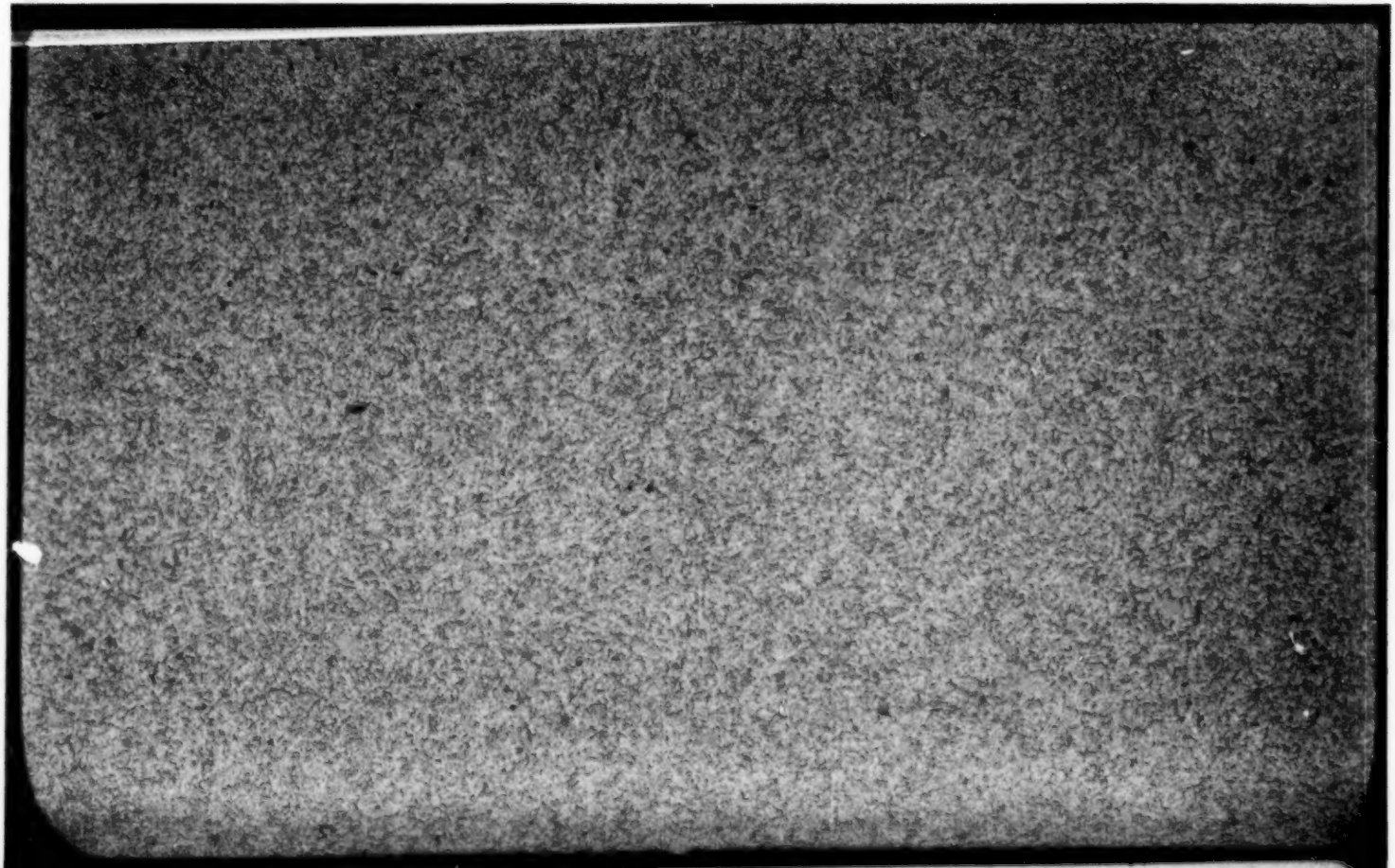

SERVICE OF BRIEF.

ACKNOWLEDGMENT.

Service of this brief is acknowledged this 10 day of March, 1920.

.....

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Service Acknowledged

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CONSTITUTION AND LAWS OF OKLAHOMA QUOTED AND CITED.

Constitution of Oklahoma:

Wilson's Rev. & Ann. St. Okla. 1903:

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CASES REFERRED TO.

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BRIEF OF RESPONDENT.

STATEMENT.

With reference to abstract and statement, pages 1-12 of the brief of petitioner, we would beg leave to call the attention of the Honorable Court to the fact, that in refusing to enjoin the assessment of the Indian lands in question and the collection of the taxes thereon in the cases of *Gleason* v. *Wood*, and *Choate* v. *Trapp*, the courts of Oklahoma were

called upon to construe and apply certain Acts of Congress. The Act of June 28, 1898 (30 St. 495, c. 517), generally known as the Atoka Agreement, which made said lands non-taxable, and the later Act of May 27, 1908 (35 St. 312, c. 199), sections one and four of which apparently made said lands taxable. In the case of *Gleason* v. *Wood*, 28 Okla. 502, at page 516, Mr. Justice Dunn, who wrote the opinion, states, as his reasons for upholding the later act and holding the lands taxable under it, that "In the considertion of a law, all doubts are to be resolved in favor of its constitutionality. * * * The act is a federal statute, and has been held valid by the federal court sitting within the jurisdiction where these lands lie, and this conclusion is strongly persuasive with us." It was, therefore, in deference to the Act of Congress and the decision of the federal court of the district that influenced the State Supreme Court of Oklahoma to uphold the Act making the lands taxable, and not any desire upon the part of the state officers or courts to impose unjust burdens of taxation upon the Indian citizens of the State of Oklahoma whose lands were involved. The case of *Choate* v. *Trapp*, 28 Okla. 517, but follows the case of *Gleason* v. *Wood*, the same question being involved.

The Supreme Court of the United States in the case of *Choate* v. *Trapp*, 224 U. S. 665, reversing 28 Okla. 517, in effect held that the provision for non-taxation of Indian

lands under Act of Congress of June 28, 1898 (30 St. 495), was a property right not subject to action of Congress, and that such provision was binding upon the State of Oklahoma, that it was a vested right and could not be abrogated by statute. The decree of the state court refusing to enjoin the assessment was in both cases reversed and the causes were remanded. In *Gleason* v. *Wood* the complaint sought to enjoin the assessment for taxation for the year 1909, 224 U. S. 679. It is to be observed that in neither case was any recovery sought of taxes paid, nor was any granted. This controversy arose out of the Act of May 27, 1908, as above pointed out, for which the state was in no wise responsible, the provisions of the state constitution upon the subject, being clear and not susceptible of a misconstruction. There shall be exempt from taxation "such property as may be exempt by reason of treaty stipulation, existing between the Indians and the United States Government, or by Federal laws, during the force and effect of such treaties or Federal laws" (Const. Okla., Art. 10, Section 6).

At page 9 of petitioner's brief it is contended that the petition alleges that Love County assessed, levied, collected, received and retained all the taxes paid, which are sought to be recovered, and that the demurrer thereto admitted these statements to be true. As this is the point discussed in his first specification of error we will answer it in the

consideration of such alleged error. What is said by petitioner on page 13 of his brief is connected with the point presented in his fourth specification of error, and will be considered in answering that point.

In reviewing this proceeding the state procedure elected and attempted to be followed by the petitioner in attempting to collect these claims from the county must not be lost sight of, for this is not an action at law, neither is it a suit in equity, brought in a court of general original jurisdiction against the county to recover taxes illegally assessed and paid to the county; but on the contrary, is a special proceeding under a state statute of Oklahoma (Rev. Laws, Sec. 1631, and ch. 186 Ses. Laws 1913, p. 416, *infra*), in which petitioner filed his claims for taxes paid on non-taxable lands with the county clerk of the county and presented the same to the board of county commissioners, the board of audit for the county, for allowance as a proper charge against the county which they should allow and cause to be paid out of the county funds (R. 202, 4-202).

This board is one of limited jurisdiction, its powers being defined and limited by the state law which created it, and whose powers and jurisdiction are not extended by any Act of Congress, Indian treaty or provision of the Constitution of the United States. This board has no equity jurisdiction like that of a court of general jurisdiction of the State of Oklahoma, and in considering these claims it only had au-

thority to ascertain whether they were itemized so that from them it might be determined what amount of the tax was county tax which the county had received and for which it might be liable and whether as to form these claims in all other respects complied with the requirements of the state law under which they were filed, and whether they were filed within the time required by law, and all requirements of law had been complied with requisite to give the board jurisdiction to allow such claims, and whether they could under the law be allowed as a proper charge against the county.

Having refused allowance of these claims (R. 202), an appeal under the statute was taken from the action of the board to the district court of the county (R. 202-203), and under this statute the matter was there considered *de novo*, the district court having only the jurisdiction of the inferior tribunal from which the appeal was taken and to consider the same questions presented to the board in the proceedings had before it (R. L. Okla. 1910, sects. 1640-1643, *infra.*)

The proceeding on appeal from the action of the board of county commissioners in disallowing the claims could not therefore be changed in the district court to an action at law or suit in equity to recover judgment on such claims against the county.

Bostick v. *Board of County Commissioners,* 19 Okla. 92, holding:

"3. Upon an appeal from the board of county commissioners, the district court takes appellate jurisdiction only, which is the jurisdiction that the inferior tribunal had and none other; and in such case the district court cannot convert such action into an action of equity and assume a jurisdiction of equity that the inferior tribunal did not have."

Parker v. *Board of County Commissioners*, 41 Okla. 723, holding:

"2. Upon an appeal from the board of county commissioners, the district court takes appellate jurisdiction only; same being confined to the jurisdiction the board had and none other, to an inquiring, *de novo*, as to the very matter upon which the board was called upon to act. Such appeal cannot be converted into an action in equity, so as to enlarge the jurisdiction beyond that of the inferior tribunal."

Milam v. *Smith Mauer Bros.*, 38 Okla. 328.

Smith v. *Board of County Commissioners*, 162 Pac. 463.

If, therefore, as contended by petitioner he was, because of the peculiar nature of his claims, and the status of the Indian allottees, entitled to equitable relief, in filing such claim with the board of county commissioners and in appealing from their order of disallowance he erred in the selection of his proceeding, for he should have brought his action in the district court in the first instance, which being a court of original equity jurisdiction, was clothed with jurisdiction to grant the relief sought by him.

The question as to whether the action of the board of

county commissioners was proper in rejecting the claims was presented to the district court by demurrer, and it was decided that the claims should be allowed. On appeal to the Supreme Court of Oklahoma the only question before the court, which involved the matters considered in its opinion, was, did the district court err in overruling the demurrer to the petition, which question presented again the sole question as to whether the board erred in disallowing the claim, and whether they had acted properly under the law of the state governing the presentation of claims against the county for allowance, in disallowing the claims, and the Supreme Court in deciding that the District Court erred in overruling the demurrer, decided that the board had acted properly in disallowing these claims. As we view this appeal to this court the only question properly presented in this appeal is a question of the proper construction of the state statutes of Oklahoma governing the presentation of claims to a board of county commissioners of a county in Oklahoma, and whether under such statutes in the rejection of the claims involved the board acted properly or erred under the state law governing their jurisdiction and procedure. This, of course, involves no federal question for this Court to determine, and the proceeding should be dismissed for the reasons pointed out in our brief and motion to dismiss.

POINT I.

First Specification of Error.

This specification of error is set forth and argued at pages 14-20 of petitioner's brief. The error alleged is:

"It was error for the Oklahoma Supreme Court to hold that no recovery could be had in this action because the respondent, Love County, may have paid out part of the tax money collected from petitioners to various subdivisions of the county, in the absence of a state statute authorizing it."

At page 9 of petitioner's brief is found a statement relating to the alleged error complained of, which statement is as follows:

"It is to be noted that in the entire petition no reference is made as to any part of the taxes assessed, levied and paid on these allotments belonging to any other subdivision of Oklahoma than the respondent, Love County. In each instance the allegation is made that Love County levied the taxes and that Love County received the taxes and that Love County retained the taxes. Counsel are calling attention to this fact at this time for the reason that in the first paragraph of the syllabus of the opinion in this case by the Supreme Court of Oklahoma and in the opinion itself, it is inferred that a part of the taxes levied and collected belonged to the school districts, townships or other subdivisions.

"The demurrer of the respondent, Love County, in the trial court admitting all the allegations of the petitioners to be true, it cannot be said by the Supreme Court of Oklahoma that any part of these taxes were for the use and benefit of any other than the respondent, Love County."

ARGUMENT.

The argument of petitioner on the merits and in his brief resisting the motion to dismiss this appeal rests largely upon the false premise, as above set forth, that the taxes sought to be recovered were assessed by respondent, Love County, and were levied by and paid to it and were retained by it, and that none of the taxes sought to be recovered were state, township, school district or other municipal taxes, which had been paid over to such other municipalities, under the law, and expended long before the claims of petitioner for a refund thereof by the county of Love had been presented to its board of county commissioners for allowance as a proper charge against the county.

The first paragraph of the syllabus to which petitioner objects is found at page 16 of his brief (R. 211), and is as follows:

> "In the absence of a statute imposing liability therefor a county is not liable for taxes wrongfully collected by a county treasurer and by him paid over to the state or a municipal subdivision of the state other than the county against which liability is sought to be enforced."

In that part of the opinion passing upon the point announced in the foregoing paragraph of the syllabus, it is pointed out that taxes are collected by and paid to the county treasurer, and are not collected by or paid to the county in the first instance as petitioner would have this

Court believe, and it is further pointed out therein that no taxes collected are paid into the county treasury except the county taxes, which are properly payable to the county. And it is further pointed out therein that there is no statute in Oklahoma making the county liable for taxes collected for and paid out to the state, and municipalities thereof other than the county. This part of the opinion is as follows (R. 212-213):

> "When Section 14 of Chapter 152, Laws 1910-11, was held to be invalid there existed no statute making the county liable for the full amount of taxes collected by the county treasurer. When taxes are collected the county treasurer makes settlement with the state and the various municipalities thereof, paying to each that portion of the taxes properly belonging to it, and does not pay into the county treasury any of the taxes collected by him except that portion which is properly payable to the county.
>
> "The petition does not separate the taxes so as to show what portion was paid to the state and to the various municipalities respectively.
>
> "While the petition alleges that Love County caused the County Treasurer to collect such taxes and seeks to hold the county for the full amounts paid by claimants, there is no warrant in law for saying that the county should refund taxes which were not paid over to it."

In answering the petitioner's argument on the first specification of error we treat the questions involved under the following six subdivisions:

1. Municipal and Taxing Laws of Oklahoma and Judicial Notice or Knowledge Thereof.

In holding as above set forth, the Supreme Court of

Oklahoma took judicial notice or knowledge of the laws of Oklahoma, in force when the taxes in question were levied and collected, with reference to municipalities, their powers, the manner in which taxes were levied, collected and distributed throughout the State of Oklahoma. It, therefore, took notice that the following facts existed by virtue of such laws, which are in part hereinafter cited and quoted:

That under such laws the state caused taxes to be levied annually, to pay the yearly expenses of the state, upon the taxable property of each county and to be collected by the county treasurer of each county, as the collecting agent of the state, and to be paid over by him at the end of every three months to the state auditor, so that no state taxes collected by the county treasurer remained in his hands longer than three months after he collected the same.

That under said laws, each county in the state was a body politic and corporate, with power to sue and be sued, and to levy taxes upon the taxable property within the county annually, which taxes were to be used for the purpose of defraying its proper corporate expenses, as a county, for the fiscal year, and that the county treasurer was by law made its collecting agent to collect county taxes, and that he was required to make distribution of funds collected by him monthly; that such county taxes were required to be paid at the same time, and were collectable in the same manner as all other taxes on real property, and that no tax was re-

ceived by the county or retained, used or disposed of by it except its own county tax.

That under said laws, each township in the state was also a body politic and corporate with power to sue and be sued and to levy taxes on property within the township annually for the purpose of defraying its proper corporate charges for the fiscal year as a township, and that the county treasurer of the county in which it was situate, was made its collecting agent to collect and pay over to its treasurer such township taxes, and that at monthly periods the county clerk drew a warrant on the county treasurer payable to the township treasurer for all township taxes collected for it during the preceding month.

That under said laws, each town within the state was a body politics and corporate, with power to sue and be sued, and to levy taxes on property within the town annually for the purpose of paying its proper charges as a town for the fiscal year, and that the county treasurer of the county in which it was situate was by law made its collecting agent to collect such town taxes, and that at monthly periods the county clerk drew a warrant on the county treasurer payable to the town treasurer for all such town taxes collected for it during the preceding month.

That under said laws, each school district within the state was a body politic and corporate, with power to sue and be sued, and to levy taxes on property within the school

district annually for the purpose of paying its proper charges as a school district for the fiscal year, and that the county treasurer of the county in which it was situate was by law made its collecting agent to collect such school district taxes, and that at monthly periods the county clerk drew a warrant on the county treasurer payable to the school district treasurer for all such school district taxes collected for it during the preceding month.

That under said laws all of the foregoing taxes were required to be paid in the same manner and at the same time, and that if any tax was levied on a tract of land all taxes were levied thereon at the same time, and that all said taxes were collected in the same manner, and that the same penalties were imposed for non-payment of all such taxes.

The constitution of the state contemplates that the legislature shall confer upon counties, cities, towns and other municipal corporations power to assess and collect their respective taxes.

Art. 10, Sec. 20 of the Constitution of Oklahoma, provides:

> "The legislature shall not impose taxes for the purpose of any county, city, town, or other municipal corporation, but may by general laws confer on the proper authorities thereof, respectively, the power to assess and collect such taxes."

The legislature has carried out the foregoing require-

ment of the constitution by enacting the laws hereinafter mentioned.

These powers to assess and collect taxes, as is shown by the laws hereafter cited and quoted, in some instances are exercised directly by the governing boards, and in other instances it is provided that such governing board of the municipality may require such assessment and collection to be made by some other board or authority pointed out by law, and as to the collection of such tax the county treasurer is made the collecting authority or agent of the respective municipalities.

A state is a political corporate body, can act only through agents, and can only command by law.

Poindexter v. *Greenhow*, 114 U. S. 270.

COUNTIES.

Const. Okla., Art. XVII, Sec. 1:

"Each county of this state * * * shall be a body politic and corporate."

Under Sec. 1497 of Rev. Laws 1910:

"Each organized county within the state shall be a body corporate and politic and as such shall be empowered for the following purposes:

"First. To sue and be sued. * * * "

Under Sec. 1500 of same laws the county shall sue and be sued in the name "Board of County Commissioners of the County of....."

TOWNSHIPS.

Under Sec. 8174 of the same laws:

"Each organized township shall be a body politic and corporate, and in its proper name may sue and be sued, and may appoint by its proper officers all necessary agents and attorneys in that behalf, and may make all contracts that may be necessary and convenient for the exercise of its corporate powers."

Comp. Laws Okla. 1909, Sec. 8726:

"TOWNSHIP BOARD AND ITS DUTIES. In each township in this state organized under the provisions of this chapter, there shall be a board of directors, composed of the township trustee, township treasurer and township clerk, whose duty it shall be: * * * Third. To levy all taxes for township, road and bridge purposes. * * *"

(Ses. Laws Okla. 1897, p. 287). See R. L. Okla. 1910, Sec. 8178.

Claims against township may be presented to and allowed by township board.

Rev. Laws Okla. 1910, Sec. 8180:

"PRESENTATION AND ALLOWANCE OF ACCOUNTS. Any person having a claim or account against the township may file such claim or account in the office of the township clerk, to be kept by said clerk and laid before the township board at their next meeting: Provided, however, that any person having a claim against the township may present said claim to the township board himself, or by an agent, at any legally convened meeting of said board. Said board shall have the power to determine the legality or illegality of any claim or account against the township, or to reject said claim, or part

thereof, as to them appears just and proper; but in no case shall the township board be authorized to allow any claim, or any part thereof, until the claimant makes out a statement, verified by affidavit, to the amount and nature of his claim, setting forth that the same is correct and unpaid; or, if any part thereof has been paid, setting forth how much."

(Okla. Stat. 1893, Sec. 6028. Took effect March 14, 1893. For later statute see ch. 186 Ses. Laws 1913, p. 416 as to form of account. *Infra.*)

Ch. 32 Ses. Laws of Okla. 1909, p. 493, Sec. 29 provides:

"The township board of any township of this state shall levy a general road and bridge tax on all taxable property within their respective townships not to exceed five mills on the dollar of such taxable property, and such tax shall be collected in the same manner as other taxes are now collected by law, and the funds to the credit of any township shall be turned over to the township treasurer and shall be expended as the board of highway commissioners may in their discretion provide."

By Section 10 of said chapter, Ses. Laws Okla., p. 488, the township board of each township are made highway commissioners for such township.

Rev. Laws Okla. 1910, Sec. 8183:

"Funds—How Raised. The money necessary to defray the township charges of each township shall be levied on taxale property of each township in the man-

ner prescribed in the general revenue laws for state and county purposes."

(Took effect March 14, 1893.)

Comp. Laws Okla. 1909, Sec. 8735:

"The township board of directors shall make out an account of the amount of money necessary to defray the township expenses during the next ensuing year; said account shall be made out not more than sixty nor less than twenty days prior to the meeting of the county commissioners at which the assessment for county purposes is made. Said account shall be signed by the president of the board and attested and filed with the clerk of the county on or before the first day of said session of the county commissioners, who shall cause the same to be placed upon the tax books of said township. * * *"

(Took effect in 1893.)

(See later act which took effect June 17, 1910, R. L. Okla. 1910, Sec. 7378 *infra.*)

Towns.

Under Sec. 678 of Rev. Laws Okla. 1910:

"The president and trustees of such town and their successors in office shall constitute a body politic and corporate, by the name of the 'town of .....,' and shall be capable in law to prosecute and defend suits to which they are a party."

Under Sec. 680:

"The board of trustees shall have the following powers, viz: * * * Fifteenth. To provide for annual taxes."

Comp. Laws 1909, Sec. 856:

"Board of Trustees Determine Amount of Tax. The board of trustees shall before the third Monday of May of each year determine the amount of general tax for the current year."

(Took effect in 1893. See later act R. L. 1910, Sec. 7378, *infra.*)

Same laws, Sec. 858:

"When the assessment roll shall have been corrected and completed the trustees shall levy a tax upon the taxable property of said town to such an amount as they may deem necessary, and shall set opposite the name of each person taxed a description and valuation of the property charged therewith and the amount of tax assessed against such person; * * * . The assessment roll and tax list shall be deposited with the county treasurer who is hereby charged with the safe custody of the same."

(Took effect in 1893.)

Rev. Laws Okla. 1910, Sec. 697:

"How Tax Collected. The treasurer of such county shall collect the corporation taxes, upon such duplicate as other taxes are collected, and pay the same over to the treasurer of such corporation. The county treasurer shall be allowed and paid by the corporation the same compensation as is paid by the county for like services."

(Took effect December 25, 1890.)

School Districts.

Rev. Laws Okla. 1910, Section 7779:

"Corporations. Every school district organized in

pursuance of this article shall be a body corporate, and shall possess the usual powers of a corporation for public purposes by the name and style of school district.... (such number as may be designated by the county superintendent) * * *, and in that name may sue and be sued, and be capable of contracting and being contracted with, and hold such real and personal estate as it may come into possession of by will or otherwise, or is authorized by law to be purchased."

(Stat. Okla. 1893, Sec. 5765.)

Rev. Laws Okla. 1910, Sec. 7795:

"Officers of District. The officers of each school district shall be a director, clerk and treasurer, who shall constitute the district board. * * *"

(Comp. Laws Okla. 1909, Sec. 8081. Ses. Laws of Okla. 1907-8, p. 399.)

Comp. Laws Okla. 1909, Sec. 8117:

"Taxes. It shall be the duty of the school district board of the various school districts of the respective counties of the state to cause to be certified by the school district clerk to the couty clerk of their respective counties, on or before the twenty-fifth day of August, annually, the aggregate percentage by them levied on the real and personal property in each district, as returned on the assessment roll of the county; and the county clerk is hereby authorized and required to place the same on the tax roll of said county, in a separate column or columns, designating the purpose for which said taxes were levied; and the said taxes shall be collected by the county treasurer and paid over to the treasurers of the respective school districts in the county, with the same power and restrictions and under the same regulations and in all respects, as to the sale of real and personal

property. He shall be authorized, and is hereby required, to act according to the provisions and requisitions of the law for the collection of the taxes for state, county and township purposes."

(Okla. Stat. 1893, Sec. 5805.) For later act see Sec. 7378, Rev. Laws Okla. 1910, *infra.*

STATE TAXES.

Rev. Laws Okla. 1910, Sec. 7377:

"AUDITOR TO TRANSMIT STATE RATE TO COUNTY CLERK. On or before the first Monday in June of each year the state auditor shall transmit to the county clerk of each county a statement of the rate of taxation required in said county for the general state tax as computed by the state board of equalization."

(Ses. Laws Okla. 1909, Ch. 38, Art. 8, Sec. 1, p. 600. Took effect March 10, 1909; Comp. Laws Okla. 1909, Sec. 7623.)

A later law governing assessment and levy of taxes.

Rev. Laws Okla. 1910, Sec. 7378:

"ANNUAL ESTIMATE OF MUNICIPAL EXPENSES. Each board of county commissioners, the mayor and council of each city, * * * the board of trustees of each incorporated town, the directors of each township, the board of education of each city and the directors of each school district, shall meet on the first Monday of July of each year, and shall respectively make out an itemized statement of the fiscal condition of their respective municipalties and of the estimated needs thereof for the current expenses of the ensuing fiscal year." (What each such estimate is required to show is set forth next in the section.) "Each estimate for county, city, incorporated town, township and school district purposes, as prepared * * * shall be published in some newspaper published in each such county, city, incorporated town, township and school district. * * *" (If no paper is

published in the municipality five notices must be posted therein.) "Said publication shall be made in each instance by the board or authority making the estimate. * * * ."

The section further provides that after publication the estimate shall be certified to the excise board of the county.

(Ses. Laws Okla. 1910, p. 110, Ch. 64, Sec. 2. Took effect June 17, 1910.)

Section 7380 of Rev. Laws 1910, requires the county excise board to meet on the last Saturday in July of each year for the purpose "of examining the estimates of expenses for the county, and for each city, town, board of education, township and each school district therein. * * * They shall have power to revise and correct any estimate certified to them where the amount thereof is in excess of the just and reasonable needs of the municipality for which the same is made. When they have approved each estimate, * * * they shall thereupon make the levy therefor, * * *. The levy so made by them shall be certified to the county clerk, who shall extend the same upon the tax roll.' "

(Ses. Laws Okla. 1910, p. 111, Ch. 64, Sec. 4. Took effect June 17, 1910.)

Duty of county clerk and treasurer—How tax books and rolls are made out:

R. L. Okla. 1910, Sec. 7359:

"How Tax Books Made Out. The county clerk of each county, in making out the tax books for each county, shall consolidate all state taxes under one heading; he shall also consolidate all the county, township and municipal levies and extend each under the one head in a column by itself; the district school levy shall be extended separately and in a column by itself."

(Laws 1909, p. 597. Took effect March 10, 1909.)

Same laws, Sec. 7360:

"In making out the tax books and extending the tax, the county clerk shall separate and extend such tax by municipal townships."

(Laws 1909, p. 597. Took effect March 10, 1909.)

Section 7368 of Rev. Laws of Okla. 1910, provides that as soon as practicable after the taxes are levied the county clerk shall make out a list of all taxable lands in the county, with the valuation of each tract and the amount of taxes, and if any delinquent taxes the same is set down in a separate column. This is the tax roll. (Ses. Laws 1909, p. 602.)

Section 7387 of the same laws provides:

"The tax roll when completed shall be delivered to the county treasurer on or before the first day of October following the date of levy for the current year."

(Ses. Laws Okla. 1909, p. 603. Both last above sections took effect March 10, 1909.)

Duty of county treasurer to collect all taxes:

Section 7356 of the same laws provides:

"The county treasurer of each county upon receipt of said tax rolls, shall proceed with the collection of the taxes as therein extended, issuing in triplicate receipts upon all collections, delivering the original to the taxpayer and filing the triplicate with the county clerk; Provided, that said receipt shall be in manner and form the same as the tax rolls and shall have printed on them

the several items of levy, by and upon which tax is authorized and collected, and shall have endorsed thereon in red ink the amount of delinquent taxes levied against the property."

(Ses. Laws Okla. 1909, p. 596. Took effect March 10, 1909.)

Duty of county treasurer to make distribution of tax collected:

Rev. Laws of Okla. 1910, Sec. 7363:

"Collections Distributed Monthly. At the end of each calendar month the county treasurer shall apportion all collections for said month, and distribute the same among the different funds to which they belong."

(Ses. Laws Okla. 1909, p. 597, Ch. 38, Art. 5, Sec. 13. Took effect March 10, 1909; Comp. Laws Okla. 1909, Sec. 7613.)

Duty of county treasurer to pay over state taxes collected:

Rev. Laws of Okla. 1910, Sec. 7423:

"County Treasurer to Pay Over State Funds—When. The treasurers of the several counties shall pay into the state treasur all funds in their hands belonging thereto on or before the third Monday of the months of January, April, July and October."

(Ses. Laws Okla. 1909, p. 617, Ch. 38, Art. 10, Sec. 1. Took effect March 10, 1909, p. 624; Comp. Laws Okla. 1909, Sec. 7657.)

Duty of county treasurer to make report of taxes col-

lected and apportioned monthly, duty of clerk to draw warrants:

Rev. Laws Okla. 1910, Sec. 7364:

"Treasurers Monthly Statement. The county treasurer shall, at the end of each month, after apportioning the collections of that month, make a statement to the clerk of the amount apportioned each town, city, municipal township and school district for all moneys which are required by law to be paid to the treasurers of such towns, cities, municipal townships and school districts by the county treasurer, and the county clerk shall issue a warrant for the amount shown by the statement of the county treasurer, payable to the treasurer of such town, city, municipal township and school district; * * *."

(Ses. Laws Okla. 1909, p. 597, Ch. 38, Art. 5, Sec. 14. Took effect March 10, 1909, p. 624; Comp. Laws Okla. 1909, Sec. 7614.)

The method of collecting all delinquent taxes on real estate is provided in Article 9 of Chapter 72 of Rev. Laws Okla. 1910, Sections 7389-7422, which are not quoted here, because of their great length. They may be summarized as follows: The county treasurer advertises for sale real property on which taxes are delinquent each year and sells the same for taxes, 18 per cent interest thereon, and 25 cents penalty on each tract other than town lots, and issues to the purchaser a certificate of purchase. The owner may redeem at any time within two years by payment of amount due. If the land is not redeemed at the end of two years after the sale, the holder of the certificate of purchase may obtain a

tax deed by surrender of his certificate and otherwise complying with the requirements of the law as to service of notice, publication, etc.

2. Love County was not liable for the taxes collected for and paid to the state and townships, towns, and school districts.

It is to be noted that of the 67 claims filed by petitioner with the board of county commissioners for allowance as a charge against Love County (R. 4-202) in but few instances was payment made of taxes by allottees after the Supreme Court of the United States had decided that the Indian lands in question were non-taxable in the case of *Choate* v. *Trapp*, 224 U. S. 665, on May 12, 1912, and that these 67 claims were not filed with the board for allowance until three years five months and thirteeen days after the determination of that case, or until October 25th, 1915 (R. 202).

Hence the Supreme Court of Oklahoma further took judicial notice or knowledge of the fact that under the Oklahoma laws above cited, at the time these claims were finally filed with the county clerk for allowance by the board of county commissioners, all state taxes collected by the county treasurer from these allottees had long since been paid over to the state and expended by it, and that likewise all such taxes collected by him for the county had been paid into the county funds and expended, and likewise all such taxes collected for the other municipalities had long since been paid

by him to them and had been expended by them, so that, at the time such claims were so filed, none of such taxes so paid were in the hands of the county treasurer of Love County, the respondent.

Hence the Supreme Court of Oklahoma, after pointing out the absence of any statute making the county liable for taxes so collected and paid out to the state, townships, towns and school districts, held that Love County was not liable for such taxes.

We fail to grasp the import of any equitable principles or considerations urged by the petitioner which would make the respondent county liable for taxes levied by and collected for the state through its tax collecting agency appointed by law, and already paid over to the state and expended by it, and likewise we fail to see by what principles of equity the county should be liable for township taxes levied and collected by the township through its agent appointed by law and paid over and expended by it, and likewise with the town taxes, and school district taxes. As we have seen, all of these municipalities had the power to sue and be sued, and if the county is to be held liable for all these taxes because of any equitable considerations, by the same rule petitioner might have filed all these claims with any township clerk and demanded that its board allow all state, county, township and school district taxes so paid because

the county treasurer collected and paid over to it its township taxes levied on these exempt lands within the township, and likewise he might have sued any school district to recover all these taxes upon the same ground.

That in order to recover such taxes after the same had been collected and paid over to the state and the various municipalities, it would be necessary to institute suit against the various municipalities to recover the amount of tax received by each respectively, and that one municipality could not be picked out and recovery had against it for all taxes collected and paid over to all, is recognized as one of the grounds for granting injunctive relief to prevent the collection of an unjust tax by this Honorable Court in the case of *Raymond, Treasurer of Cooke County, v. Chicago Union Trac-Company*, 207 U. S. 20, holding:

> "3. Where a corporation had paid the full amount of its tax as based upon the same rate as that levied upon other property of the same class, equity will restrain the collection of the excess illegally assessed, there being no adequate remedy at law, when it appears that it would require a multiplicity of suits against the various taxing authorities to recover the tax and that a portion of it would go to the state against which no action would lie."

The holding of the Supreme Court of Oklahoma is also upheld by the following authorities:

Dillon, Municipal Corporations, Vol. 4 (5th Ed.):

Sec. 1616. ACTION TO RECOVER BACK ILLEGAL TAXES. An important class of actions, in form *ex contractu*, remains to be noticed. We refer to actions against municipal corporations to recover back money paid to them for taxes. They are usually brought in assumpsit for money had and received, and are equitable in their nature; and hence they will not lie, in the absence of statutory provisions, except for money actually paid to the corporation, and which it is against equity and good conscience that it should retain. * * *."

"Sec. 1617. *Same Subject. Elements of Liability.* Actions against a municipal corporation to recover back money upon the ground of the illegality of the tax or assessment are, upon principle and the weight of authority, maintanable when, and in general only when (if there be no statute enlarging the liability) the following requisites co-exist: 1. The authority to levy the tax, or to levy it upon the property in question, must be wholly wanting, or the tax itself wholly unauthorized, in which case the assessment is not simply irregular, but absolutely void.

"2. The money sued for must have been actually received by the defendant corporation, and received by it for its own use, and not as agent or instrument to assess and collect money for the benefit of the State, or other public corporation or person.

"3. The payment to the plaintiff must have been made upon compulsion, as, for example, to prevent the immediate seizure of his goods or the arrest of the person, and not voluntarily.

"Unless these conditions concur, payment under protest will not, without statutory aid, give a right of recovery."

It is to be here observed with reference to the taxes in

question, that the authority to levy them was wholly wanting, hence they came within the first requisite of the foregoing section, and that petitioner claims that they come within the third requisite of the section as being taxes paid under compulsion; but the existence of both the requisites and conditions of the first requisite and second requisite do not make all these taxes collectible against the county, because to be recoverable all three requisites must co-exist, and as we have shown the money for state, township, town and school district taxes was not in fact received by the county, and was not for its own use, and hence the second requisite is entirely wanting and non-existant, therefore there is no liability upon the county to repay state, township, town and school district taxes collected by its county treasurer and paid over by him to them.

Union Bank v. *Mayor, etc.*, 51 Barb. (N. Y.) 159, at pages 183-184.

B. & M. R. Co. v. *Buffalo County*, 14 Neb. 51, at p. 54.

Shoemaker v. *Board of County Commissioners*, 36 *Ind.* 175.

Stone v. *County of Woodbury*, 51 Iowa 522.

Proce v. *Lancaster County*, 18 Neb. 199, 24 N. W. 705, holding:

"1. Where a county treasurer collects and pays over taxes for the state and for school districts and other municipalities, less than and within the county, such county is not liable to the tax payer for such taxes, even

if illegally levied; and this would be true whether he sought to recover back such taxes under the provisions of the revenue law, or as a genertl creditor of the county."

In the opinion it is said:

"* * * the county could not be held for the repayment of the taxes collected for the state, or any of the municipalities less than the county. * * *

"But plaintiff insists that he is not seeking to recover under any of the provisions of the revenue law, but upon the ground that 'defendant has money in its possession belonging to plaintiff that he has wrongfully and illegally been forced to pay, and that he has a general right of recovery for the amount thereof.' We are unable to agree to this proposition. The county was made by law the agent of the state, as well as of the lesser municipalities within the county, for the collection of the taxes due them. * * * the taxes, other than county taxes, could in no sense be said to be a claim against the county."

In that case the county board disallowed the claim for a refund of taxes paid by plaintiff, he appealed to the district court from their order, where defendant demurred. The court sustained the demurrer, and its judgment was affirmed on appeal.

Meacham v. *Town of Newport*, 70 Vt. 264, 40 Atl. 729, holding:

"4. A taxpayer cannot recover town school-district taxes illegally collected, where the town has paid them to the district, which covers only a portion of the town, before suit is brought.

"5. A town is liable in general assumpsit for taxes

illegally collected only when it has them in its possession."

We quote from the opinion:

"5. A town is liable in general assumpsit for taxes illegally collected only when it has them in its possession."

"The plaintiff contends that he is entitled to recover the amount paid by him as town school-district tax. This was not in the town treasury when the suit was brought. It is found that the defendant had before paid it to the treasurer of the town school district. In the defendant town, the town school district covers only a portion of the town, and had a grand list of only about one fifth of the grand list of the whole town. We do not think that the town could compel the town school-district to return this sum, any more than it could compel the return of that which it had paid to the state treasurer. The town no more had this sum in its possession or control than it did the sum which it had assessed, collected from the plaintiff, and paid over to the state treasurer. If it had to pay it to the plaintiff, it must collect it from all its taxpayers, many of whom can and will receive no benefit from it. Besides, in this form of action, the town is liable only for money belonging to the plaintiff which it holds without right. It does not hold the claimed sum. There was no error in denying his right to recover it." The action was general assumpsit.

Commonwealth, etc., v. *Boske et al.*, 30 Ky. Law 400, 99 S. W. 316, holding:

"Where taxes have been wrongfully collected by coun-

ty officials and are in the hands of the collecting and disbursing officers, a direct action may be brought by the taxpayer against the person holding the taxes, but a taxpayer cannot maintain an action against a county to recover taxes illegally and wrongfully exacted by the county officers, after the taxes have been paid out by the disbursing officers."

Wilson v. *Board of Commissioners of Allen County, et al.*, 99 Kan. 586, 710, 162 Pac. 1158, holding:

"The payment of school taxes without protest and in the belief that the land constituted part of a school district comprising a city of the second class is a voluntary payment, and, after the taxes have been paid over to the board of education, and have been distributed for school purposes, it is too late for the landowner to maintain an action to recover them on the ground that the land had been detached from the district in which they had been assessed."

Commissioners of Pawnee County v. *A. T. & S. F. R. Co.*, 21 Kan. 748.

The last case cited was an action brought by the railroad company against the board of county commissioners to recover back certain taxes paid by it to the county treasurer, alleged to have been illegal, and paid under protest and to prevent the issuing of warrants for their collection. Defendant demurred to the petition which was overruled and the county appealed, and upon appeal the trial court was reversed. Valentine, J., who wrote the opinion, gives as his grounds therefor at page 750:

"The county treasurer, and not the county commissioners, collected these taxes. They were collected for certain school-districts, and not for the county or county commissioners. And it does not seem that a single cent of them was ever placed to the credit of the county or the county commissioners. Whether the county treasurer has paid them over to the respective school districts or still holds them, is not shown. Probably he has paid them over to the districts, for it was his duty to do so under the law. * * * Everything that has been done concerning said taxes, has been done by the school districts, respectively, and by the county treasurer; and not a thing has been done by the county or county commissioners. And it has been done for the benefit of said school-districts, and not for the benefit of the county or the county commissioners. Now, as neither the county nor the county commissioners have ever done any wrong as against the railroad company, as they have not ratified any wrong, and as they have not received the benefit of any wrong, how can they be held liable? We think they are not liable."

So with reference to the state, township, town and school district taxes levied on the non-taxable Indian allotments and collected by the county treasurer, and paid over as required by the statutes heretofore quoted, the same may be said, with reference to the non-liability of the county therefor, as is said with reference to the non-liability of the county for school taxes wrongfully collected of the railroad company in the foregoing case.

3. The Supreme Court of Oklahoma was warranted in disregarding the allegations of mere conclusions in the petition, that Love County assessed, levied, collected and retained all the taxes sought to be recovered, and same were not admitted by demurrer.

We have already pointed out that under the statutes Love county collected none of the taxes in question, that all were collected by the county treasurer, as the collecting agent for the state, the county, the towns, townships and school districts, and that the county never received, used, or retained any of the taxes except the portion levied for its proper county purposes. So that the allegation, of the existence of a state of facts, in the petition which could not exist under the statutes in force, would not be admitted by demurrer, being mere conclusions, the court taking judicial notice of the law and that such alleged conditions did not exist.

We cite the following authorities in support of the foregoing proposition:

Williams v. *Stewart, Tax Collector*, 115 Ga. 864, 42 S. E. 256, holding:

> "1. Where an officer not authorized to issue a warrant notifies a person that he will have him arrested on a warrant, and prosecuted, unless he pays a certain tax, and such person, because of such threat, pays the tax, the payment is voluntary, under Civ. Code, sec. 3723, and the money paid cannot be recovered.
>
> "2. A petition seeking to recover money so paid is

subject to demurrer, *although it alleges that such payment was made under an urgent and immediate necessity therefor, and to prevent an immediate seizure of the plaintiff's person and property. These averments are but conclusions of law, and can avail nothing, where it appears that the facts upon which they are based make the payment a voluntary one.*"

Prichard v. *Commissioners, etc.*, 36 S. E. 353 (N. C.), holding:

"5. Where a complaint pleads a statute which has no existence, and is not a law of the state, a demurrer to the complaint admits only the facts alleged therein, and has not the effect to admit the existence of the statute."

So where allegations in complaint are contrary to an act of the legislature, such allegations are not admitted by a demurrer.

People v. *Company*, 50 Pac. 305 (Calif.), holding:

"3. On demurrer to a complaint, the court may take judicial notice of a legislative land grant, though the allegations of such complaint are contrary to such grant."

In passing upon this point the court say at p. 308:

"Why should a general demurrer to a complaint be overruled, and the parties be required to proceed to the trial of an issue of fact, when the court, looking to a law of which it is bound to take notice, can see that one of the essential allegations of the complaint can never by any legal possibility be proved?"

Henderson v. *McMaster*, 88 S. E. 645 (S. C.), holding:

"1. A demurrer admits facts, but not constructions of statutes or conclusions of law or fact.

"13. The allegation that by reason of enactment of a statute a foreign insurer was compelled to withdraw from the state is a conclusion of fact, and is not admitted on demurrer."

In that case a statute was alleged to be unconstitutional "In that, 'the state warehouse commissioner is authorized to take any and all kinds of insurance on all classes of property, at any rates he may see fit, while the petitioner cannot accept any risk, and therefore is deprived of his property without due process of law, and is denied the equal protection of the law.' A demurrer admits facts, but not constructions of statutes or conclusions of law or fact."

Brown v. *Avery*, 58 So. 34 (Fla.), holding:

"4. A demurrer admits all such matters of fact as are sufficiently plead, but allegations of mere conclusions of law are not admitted by a demurrer, for the law is to be ascertained by the court.

"5. A demurrer does not admit as true allegations which the law would not allow to be proved."

Heiskell v. *Knox County*, 177 S. W. 483 (Tenn.) holding:

"2. Judicial notice of legislative journals, showing the proper enactment of a statute, may be taken on demurrer to a bill, charging that a statute was not regularly enacted; a demurrer not admitting allegations contrary to facts judicially known to the court."

Fey v. *Rossi, etc., Co.*, 139 Pac. 908 (Cal. App.), holding:

"2. In an action to cancel a lease, a demurrer did not admit the allegations of the complaint as to the enactment, scope and effect of a statute relied upon as

making performance impossible, since a demurrer does not admit conclusions of law or facts of which the court may take judicial notice."

French v. *Senate etc.,* 80 Pac. 1031 (Cal.) holding:

"6. Allegations of a pleading which are unnecessary and which are contrary to facts of which judicial notice is taken are not admitted by demurrer, but will be treated as a nullity."

McLane v. *Paschal,* 28 S. W. 711 (Tex. Civ. App.) holding:

"4. An allegation in a petition that the Revised Statutes are invalid is not admitted by a demurrer, the court taking judicial notice of their validity."

31 Cyc. page 337 and cases cited in support of the text.

4. The Supreme Court of Oklahoma found that the petition did not separate the taxes so as to show what portion was paid to the state and to the various municipalities. Hence it did not show what portion was paid to the county for which it might be liable, and not being so itemized, the board of county commissioners did not err in disallowing the claims.

The Supreme Court of Oklahoma in its opinion (R 212) points out the statute of the state of Oklahoma prescribing the procedure which petitioner, referred to as defendant in error, had elected to follow in his attempt to recover the taxes paid from respondent county, in the following language:

"Defendants in error say, however, that sections 1 and 2 of chapter 186 Session Laws, 1913, page 416, confers au-

thority upon the board of county commissioners to allow and order paid the demands which form the basis of this litigation."

The sections cited are as follows:

"*Claims to be Itemized and Verified—Filing.*

"Section 1. All claims for money due from any county, township, city or incorporated town shall be itemized in detail, verified and filed for allowance with the proper authority not less than five days before the meeting of such body for such purposes. Such verified claims shall show in detail the amount due on each item, the date thereof, the purpose for which each item was expended, and such other facts as are necessary to show the legality of such claim and each item thereof."

"*Examination and Allowance of Claim.*

"Section 2. The proper authority of each county, township, city or incorporated town authorized by law to allow claims shall examine into each claim so filed for allowance at the meetings authorized by law to make such allowance, and if the same, or any part thereof, is found to be correct and is in compliance with section 1 of this act, the same shall be allowed for payment and a warrant issued therefor."

Section 3 of the same chapter provides:

"Any member of the board of county commissioners, township board, city council, board of trustees of incorated town, knowingly, willfully and intentionally allowing any claim or entering into any contract on the part of such county, township, city or incorporated town, not specifically authorized by law, shall be deemed guilty of a felony * * *."

As to allowance of claims against the county by the

board of county commissioners the Rev. Laws Okla. 1910 provide:

> "Section 1631. No account shall be allowed by the county commissioners unless the same shall be made out in separate items, and the nature of each item stated; * * * which account so made out shall be verified by affidavit setting forth that the same is just and correct and remains due and unpaid which account shall be regularly filed with the county clerk five days before first day of the meeting of the county commissioners. * * * *."

Both section 1 of Ch. 186, Ses. Laws 1913, and Sec. 1631, *supra*, provide that the account filed against the county for allowance as a proper charge against the county by its board of county commissioners be itemized, to the end that from an examination of the account itself, and without any other evidence or data, the board of county commissioners may ascertain from the items whether they are a proper charge against the county which they can lawfully allow, or may be able to pick out from the account such items as are allowable and the sum due thereon, and may allow the same for the amount due thereon, and reject such items as are not allowable against the county, and disallow the same. And it is to noted that if the acount is not itemized as required, its allowance is prohibited by the first words of section 1631 *supra*.

The Supreme Court found in its opinion that the claims

did not comply with the requirements of the law above quoted, for the court say (R. 213):

> "The petition does not separate the taxes so as to show what portion was paid to the state and to the various municipalities respectively."

The claims therefore were not so itemized as to show what part of the taxes were levied for county purposes and were collected for and used or retained by the county, and the amount of such county taxes paid, so that the board could ascertain from the claims or petition for what amount they might be allowed as a proper charge against the county. The claims are for the whole amount of taxes, state, county, township and school district paid on the lands for each year, and the totals for all years paid, and the county tax is nowhere separated and stated and the board informed of the amount thereof. They are all in substantially the form following (R. 16):

> "Description, E 1-2; SW 1-4; W. 1-2; SE 1-4; 1909 tax, $31.68, paid 5-24-10; 1910 tax, $29.44, paid 5-14-11; 1911 tax -38.67, paid 1-1-12. Total, -99.79."

Therefore, the claims not being itemized as contemplated by the statutes above quoted, the board had no jurisdiction under the law to allow them, its jurisdiction, because of such defect in their form, being taken away by the very first words of section 1631, *supra*, "No account shall be allowed by the county commissioners, unless," the account or

claim be itemized and otherwise in form and made out as required by the above quoted statutes.

In *Allen* v. *Commissioners of Pittsburg County*, 28 Okla. 773, in passing upon the authority of a board of county commissioners and with reference to the manner in which claims should be made out for presentation to them for allowance under the state statute, at page 775, the following from the case of *Osterhoudt* v. *Rigney*, 98 N. Y. 232, is quoted with approval:

> "But boards of audit in allowing accounts are limited to the powers conferred upon them by the statute; and when they transgress these limitations, their acts, like those of any other tribunal of limited jurisdiction, are void. If, for example, a board of town or county auditors should allow a claim which was plainly neither a town nor a county charge, its determination would be void, for the reason that such charges only are within its jurisdiction. * * * The same rule would follow if the account presented and allowed was one which the board, by reason of the omission of some indispensable condition, had no right to consider. For example, the statute declares that 'no account shall be audited by town auditors for any services and disbursements *unless made out in items* and verified by the claimant.' 'The object of these provisions is the protection of the taxpayers against false and fraudulent claims, and are clearly mandatory upon the board.' "

In *Smith* v. *Board of County Commissioners*, 56 Okla. 672, at 677, the section is quoted, and it is there said:

> "No attempt was made in filing these claims of the county commissioners to comply with Section 1631, Rev. Laws 1910. * * * The first count of the amended petition

was for money expended, but neither the amended petition nor the exhibit attached thereto set out the items of expenditure or the purpose thereof. * * *"

In that case the action of the trial court in sustaining a demurrer to the petition was affirmed.

In re Piney, 40 N. Y. Supl 716, at p. 717:

"Every item and detail must be so specifically stated that any one reading the account may be exactly informed of what it consists."

Clyne v. Bingham County, 7 Idaho, 75:

The requirement that the claim be itemized so that it can be ascertained therefrom what charges are proper charges against the county is mandatory.

Miller v. *Crawford County*, 106 Wis. 210.

Board of County Commissioners v. *Tomilson*, 9 Kan. 167.

Therefore, the board of county commissioners, respondent, did not err in rejecting the claims of petitioner, and his failure to collect from the county such taxes paid it, as were chargeable to it, was not because of his being deprived of a remedy, but because of his failure and negligence in not following the remedy afforded and which he was attempting to pursue. And hence the Supreme Court of Oklahoma did not err in upholding the action of respondent board in disallowing petitioner's claims.

5. The Supreme Court of Oklahoma did not err in upholding the board of county commissioners in rejecting his claims for the reason they were not filed in time.

That these claims were not filed within the time required by law is not assigned as a reason by the supreme court of Oklahoma for affirming the action of the respondent board in rejecting them.

However, if the judgment of the Supreme Court of Oklahoma be correct, it should not be reversed because of any reason announced as the ground of the decision, or because any valid ground for upholding the action of the board may not have been mentioned in its opinion; the question here being was the court right in affirming the act of the respondent board?

McClung v. *Silliman*, 6 Wheat. 596, at page 603;

"And, notwithstanding express evidence to the contrary, this court feels itself sanctioned, in referring to the decision of the state court, in this case, to the ground on which it ought to have been made, instead of that on which it appears to have been made. The question before an appellate court is, was the the judgment correct, not the ground on which the judgment professed to proceed."

Pennsylvania Railroad Co. v. *Wabash, St. L. & P. R. Co.*, 157 U. S. 225, at page 228.

St. L. & S. F. R. Co. v. *Brown*, 241 U. S. 223, holding:

"The fact that the state appellate court may have in-

accurately expressed in one respect its reasons for affirmance does not require this court to reverse, if, in fact, no reversible error exists."

The opinion of the Supreme court of the United States in the case of *Choate* v. *Trapp*, 224 U. S. 665 was handed down May 12, 1912, after which date but very few of the allottees made payment of taxes on non-taxable lands whose claims are involved in this cause, these claims were filed with the board of respondent county on October 25, 1915 (R. 202) or more than two years after the last payment had been made on the great majority of said claims, and over three years after this court had held the lands non-taxable. As to those claims on which the last payment of taxes was made prior to such decision on May 12, 1912, we will presume that it will be admitted that the right to repayment of that part thereof which were county taxes accrued at the latest on the date the lands were held non-taxable, if not on the date of the last payment of tax on said account or claim. As to all claims not filed within two years after they accrued the board had no jurisdiction to allow the same against the county, and as to the great majority of such claims, they did not err in disallowing them, and as to such claims not filed within the two years allowed by statute the Supreme Court of Oklahoma did not err in upholding the act of the board.

Revised Laws of Oklahoma 1910 provide as follows:

"Section 1570. Accounts Must Be Filed Within

TWO YEARS—EXCEPTION. No account against the county shall be allowed unless presented within two years after the same accrued: Provided, that should any person having a claim against the county be (at the time the same accrued) under any legal disability, such person shall be entitled to present the same within one year after such disability shall be removed."

Stillwater, etc., v. *Board of County Commissioners*, 29 Okla. 859, at 862.

Under a like statute it was held in the case of *Herdman* v. *Board of County Comrs.*, 6 Kan. App. 513, 50 Pac. 946, that:

"A claim against a county for compensation for land appropriated for public highways must be presented within two years after the claim accrues."

In that case the plaintiff appealed from a disallowance of his claim by the board to the district court, where a demurrer was sustained to his petition, and the case was affirmed on appeal.

Similar statute limiting the time within which claims must be presented against a county for allowance are construed and upheld in the following cases:

Elbert County v. *Swift*, 2 Ga. App. 47, 58 S. E. 396.

Carroll v. *Siebenthaler*, 37 Cal. 193.

Welch v. *Santa Cruz County*, 30 Cal. App. 123, 156 Pac. 1003.

Royster v. *Commissioners*, 98 N. C. 148, 3 S. E. 739.

Perrin v. *Honeycut*, 144 Cal. 87, 77 Pac. 776, where the statute was applied in an action involving the recovery of a payment of delinquent taxes. The demurrer to petition was sustained, and case affirmed on appeal.

The board has no jurisdiction to allow a claim not presented within the period allowed for presentation by the statute:

Cochise County v. *Wilcox*, 14 Ariz. 234.

And the statute applies to claims for refund of taxes paid:

Perrin v. *Honeycutt*, 144 Cal. 87.

Here again the petitioner was not deprived of a remedy, by reason of which he should be entitled to equitable relief, but his failure to obtain relief is traceable to his own negligence in not presenting his claims for allowance by the board within the time required by law, for which neglect equity can give no relief. Hence the action of the board and of the Supreme Court of Oklahoma should be affirmed.

6. Arguments and Authorities cited by petitioner considered.

It is contended by petitioner at pages 16-17 of his brief that as suits were pending to enjoin the collection of the tax they were sufficient notice to the county of the taxpayers claim to the money, and it was error for the Supreme Court of Oklahoma to hold a refund cannot be had because the

county has distributed the tax money to the various municipal subdivisions of the county.

We have pointed out that under the law and the opinion referred to, the tax was not distributed by the county to the various subdivisions of the county, but were levied by the state, county, townships and school districts, and were collected by the county treasurer, as the collecting agent, for each such authority levying taxes, were all paid to him at the same time on any given tract of land, and were distributed by him under the requirements of the law, to the body politic levying such tax. Under these laws the board of county commissioners had no power, unless the allottees claimed their lands were exempt by a proceeding before the board hereinafter mentioned, to prevent the collection of these taxes and that the duty of the treasurer of the county was to collect the taxes found upon the tax rolls given by the county clerk, and it matters not how much notice he or the board had the law required these taxes to be collected when found on the tax rolls and to be paid out to the municipalities for which they were collected respectively.

Had the Indian claimants of these taxes set out in the claims sought to be charged against the respondent county in this case not wished to pay the taxes assessed against their non-taxable lands, they had a plain, speedy and adequate remedy afforded by the statutes of Oklahoma for avoiding

the payment of the taxes in question, without resort to a court of equity for relief.

These statutes took effect March 10, 1909, before any of the taxes which it is sought to recover became delinquent.

Under Sec. 6013 of Wilson's Rev. and Ann. St. Okla. 1903, "on the third Monday of January following the assessment, all unpaid taxes shall become delinquent."

Before the taxes of 1908 became delinquent it was enacted by the Oklahoma Legislature Ses. Laws 1909, Ch. 38, Art. 4, Sec. 1, which took effect January 14, 1909, as follows:

> "The time for the payment of the first half of the taxes levied for the fiscal year ending June thirtieth, nineteen hundred and nine, and for the deficiency for the fiscal year ending June first, nineteen hundred and eight, is hereby extended until the third Monday of April, nineteen hundred and nine, and such taxes shall become delinquent after said third Monday in April, nineteen hundred and nine." (Session Laws 1909, p. 627.)

Before the third Monday in April, however, these sections were in force, by which allottees might have been relieved of paying all taxes assessed for the years in which they were not subject to taxation, and to have the correction made either upon the assessment or the tax rolls of the county.

The Rev. Laws of Oklahoma 1910 provide for the cor-

rection of the assessment rolls and tax rolls of the county as follows:

"Section 7353. COUNTY COMMISSIONERS MAY CORRECT ROLLS. The board of county commissioners of the various counties of the State of Oklahoma are hereby empowered to correct, either upon the assessment or upon the tax rolls of the county, any double or erroneous assessment of property for taxation for any particular year, in the manner provided in the next section, and not otherwise."

(Comp. Laws Okla. 1909, Sec. 7601; Ses. Laws Okla. 1909, p. 595, Ch. 38, Art. 5, Sec. 3. Took effect March 10, 1909, p. 624.)

"Sec. 7354. PROCEDURE TO CORRECT ROLLS. Whenever at any of the regular meetings of said boards (in January, April, July or October), upon complaint of the person beneficially interested, his agent or attorney, it shall be made to appear by the testimony of the claimant and at least one reputable witness, borne out by the records of the county, that the same property, whether real or personal, has been assessed more than once for the taxes for the same year, or that property, whether real or personal, *has been assessed in the county for the taxes of a year to which the same was not subject*, the board is hereby empowered to *issue to the claimant a certificate of error* showing that the complaint has been investigated by the said board and that the said board has been satisfied of the truth of the allegations of the said complaint, and direct the same to the county treasurer of their county, directing him to accept the said certificate as a payment of cash to the amount found by the said board to have been unjustly assessed, which said amount shall be named in the said certificate, and shall by the treasurer be credited upon his tax roll against the tax so found to be erroneous; and the treasurer shall retain

the said certificate and shall be credited with the same, as cash, in his settlement as such treasurer."

(Substantially the same as Sec. 7602 Comp. Laws 1909; Ses. Laws Okla. 1909, p. 595, Ch. 38, Art. 5, Sec. 4. Took effect March 10, 1909.)

Had any allottee made the complaint to the board of county commissioners contemplated in the last section, *supra*, and had they refused the certificate to be accepted as cash for the taxes, such allottee might have appealed under the sections following from the action of the board to the district court:

Revised Laws of Oklahoma 1910, as to appeals from the board of county commissioners, provide:

"Section 1640. APPEAL FROM ACTION OF BOARD. From all decisions of the board of commissioners upon matters properly before them, there shall be allowed an appeal to the district court by any person aggrieved, including the county by its county attorney, upon filing a bond with sufficient penalty, and one or more sureties to be approved by the county clerk, conditioned that the appellant will prosecute his or her appeal without delay, and pay all costs that he or she may be adjudged to pay in the said district court; said bond shall be executed to the county, and may be sued in the name of the county upon breach of any condition therein: * * *."

(Comp. Laws Okla., Sec. 1690; Stat. Okla. 1890, Sec. 1833; Stat. Okla. 1893, Sec. 1803.)

"Section 1641. SAME—TIME AND MANNER OF TAKING. Said appeal shall be taken within twenty days after the decision of said board, by serving a written notice on one of the board of county commissioners, and the clerk

shall, upon the filing of the bond as hereinbefore provided, make out a complete transcript of the proceedings of said board relating to the matter of their decision thereon, and shall deliver the same to the clerk of the district court."

(Comp. Laws Okla. 1909, Sec. 1691; Stat. Okla. 1890, Sec. 1834; Stat. Okla. 1893, Sec. 1804.)

"Section 1642. Same—When Filed. Said appeal shall be filed by the first day of the district court next after such appeal and said cause shall stand for trial at such term."

(Comp. Laws Okla., Sec. 1692; Stat. Okla. 1890, Sec. 183; Stat. Okla. 1893, Sec. 1805.)

"Section 1643. Same—Trial. All appeals thus taken to the district court shall be docketed as other causes pending therein, and the same shall be heard and determined *de novo*."

(Comp. Laws Okla. 1909, Sec. 1693; Stat. Okla. 1890, Sec. 1836; Stat. Okla. 1893, Sec. 1806.)

The foregoing sections are held a remedy affording relief for the avoidance of the payment of taxes upon nontaxable land, which precludes resort to equitable relief, in the case of,

Fast v. *Rogers, County Treasurer*, 30 Okla. 289.

See, also:

Thacker v. *Witt*, 166 Pac. 713 at 714.
Higgins, Neville & Boddy v. *Wood*, 43 Okla. 554.
Carroll v. *Gerlach*, 11 Okla. 151.
Wilson v. *Wiggins*, 7 Okla. 517.
Stonebraker v. *Hunter*, 215 Fed. 67 (C. C. A.)

And the duty to resort to such remedy with reference to these claims cannot be escaped by assuming, if resorted to, the wrong complained of would not have been rectified.

In *Mellon Company* v. *McCafferty, County Treasurer*, 239 U. S. 134, dismissing an appeal from the Supreme Court of Oklahoma (38 Okla. 534), it is held in the opinion by Mr. Chief Justice White:

> "2. Failure to resort to ample and efficient administrative remedies existing under the state law to review assessments claimed to have been unlawfully made, is a non-Federal ground sufficient to sustain a judgment of the state court refusing to enjoin the collection of the tax.
>
> "3. The duty to resort to an adequate remedy provided by statute cannot be escaped by assuming that even if resorted to the wrong complained of would not have been rectified."

It is therefore plain that petitioner's assignors did not escape the payment of the taxes in question, because they had no remedy, and for that reason they are entitled to equitable relief for the last cited sections gave them an adequate remedy, and they do not pretend to allege that they ever attempted to take advantage of such remedy.

The remedy which they finally sought after payment to recover back their taxes also failed in attaining the desired result, not because they had no remedy, but because they failed to properly follow the remedy afforded by properly

itemizing their claims and filing them within the time required by the procedure adopted by them, as we have heretofore shown.

After the allottees had once paid these taxes their remedy was to file an itemized account showing what taxes the county had received with the board of county commissioners for allowance. As to township taxes they should have filed claims for such taxes with the respective clerks of the townships receiving such taxes for allowance by the respective township boards under Rev. Laws Okla. 1910, Sec. 8180, and Ch. 186 Laws of 1913. Or they might sue the school districts for the money received by each respective school district, and as to state taxes a recovery thereof must depend upon some legislative action affording a means of repayment.

And the county, townships and school districts might each be sued to recover any taxes for the repayment of which they might respectively be liable. We will now consider cases cited at pages 17-20 of petitioner's brief.

With reference to the case of *Du Bois* v. *Board of County Commissioners*, 10 Ind. App. 347, 37 N. E. 1057, the action to recover the taxes was commenced, as shown by the opinion, while all the tax paid was in the county treasury, and before any of it had been distributed.

We have heretofore shown in the discussion of the manner of levy and collection of taxes 1, *supra*, that none of

these taxes could have been retained by the county treasurer under the law longer than three months after they were paid, except the county taxes, and in all instances the taxes had been expended to defray expenses of fiscal years for which they were levied, long before these claims were filed with the respondent on October 25, 1915 (R. 202). Hence that case has no application to the conditions in this case.

In *Greenbaum* v. *King*, 4 Kans. 332, the right to recovery is limited to the time the money "remains in the county treasury."

There the action was against the county treasurer, who had the control and charge of the money and who paid it out after injunction proceedings had been instituted against him, and he was held liable. Here the action is against the board of county commissioners, who under the statutes had neither charge or control over any funds except county taxes and who could not prevent the paying out and expenditure of funds other than county funds, and here the county treasurer is not a party.

In the case of *Chapman* v. *Douglas County Commissioners*, 107 U. S. 348, the county alone had received the benefits and alone was liable. Here the county received but a small part of the taxes paid and such part was not shown in the accounts filed with the board so that they might know how much it was and allow the same, the accounts not being itemized.

In *Marsh* v. *Fulton County*, 77 U. S. 676, the question was as to the liability of the county on county bonds. And its liability for obligations of other municipalities as here urged was not involved.

In *Louisiana* v. *Wood*, 102 U. S. 294, the question was as to recovery of money paid for defective bonds of a city, and no recovery was sought for money paid any other municipality as against the city.

In *Miltenberger* v. *Cook*, 18 Wallace 421, the question was with reference to internal revenue, and hence no claim of any other body politic than the United States was involved.

And the same may be said with the remainder of the cases cited on page 20 of petitioner's brief, that they do not any of them present the questions involved in this case, failure to follow a remedy afforded, neglect to avail of a remedy afforded, or an attempt to collect from one municipality taxes levied by and paid to other municipalities.

From all the foregoing we maintain that the holding in the first paragraph of the syllabus to the opinion of the Supreme Court of Oklahoma (R. 211) rests upon an independent non-Federal ground broad enough to sustain the judgment, irrespective of whether the court erred in any other or all other of its holdings, and that under the authorities

heretofore cited there was no error in said first paragraph of the syllabus and its judgment should be either affirmed or the appeal dismissed:

Mellon Company v. *McCafferty*, 239 U. S. 134.

POINT II.

Second Specification of Error.

At page 21 of his brief petitioner sets out this specification of error.

"The court erred in holding that the money paid respondent county as taxes upon allotted lands which were non-taxable under treaty with the United States and Act of Congress, June 28, 1898 (30 Stat. at L. 495), was paid voluntarily, and that in the absence of a state statute so authorizing cannot be recovered back."

We have discussed the proposition in considering the first assignment, that under the procedure adopted to collect these taxes the petitioner failed to itemize his claims so as to show to the board of county commissioners the amount of tax received by the county, so that they could under the law allow the same, if a proper county charge, and that the county could not be held liable for taxes levied and collected by the state, townships and school districts, over the levy and collection and disbursement of which the county or county commissioners had no control whatever, such taxes never coming into their possession or control, and that as to the recovery of such taxes, other than county taxes, the allottees relief was against the body politic receiving such taxes and not against the county which had not received them. And that if we are correct in our contention on the proposition considered in answering the first specification, they are sufficient to dispose of the case, irrespective of

whether the taxes were or were not paid under duress. It is to be still remembered that this is a special proceeding under a state statute originating in the presentation to and disallowance of these claims by respondent board, and is not a suit in equity nor an action at law for recovery of these taxes.

Therefore, to be strictly correct, at page 22 of his brief, respondent should have said: This present proceeding was brought under the state statute for presentation of claims to a board of county commissioners for allowance, if a proper county charge, or for disallowance if not a proper county charge, or, if not in the form or filed within the time allowed by such state statute governing such state procedure, adopted by petitioner to collect his claims. We object to the statement that "This present action was brought to recover the money paid. * * * ." It was a special statutory proceeding as heretofore shown, and not an action in assumpsit, or a suit in equity, to recover the taxes paid.

We agree with his next statement, "The decision of the Supreme Court of Oklahoma proceeds upon the theory that the right of recovery is a state question. * * *"

The proceeding selected to recover being under a state statute and the petitioner having failed to recover because

he failed to follow the statute, and because he did not file his claims in the time allowed by the statute, the question could under such a procedure be none other than a state question, and even where a tribe of Indians invoke a state procedure in seeking redress for their grievances, they are bound by the requirements of such procedure, the same as any other private individual invoking it, and can only bring it in the same manner and within the same time as other persons.

Seneca Nation of Indians v. *Christy*, 162 U. S. 283, where in the opinion it is said referring to the Act of the state legislature under which the Seneca Nation had brought the action:

"The Seneca Nation availed itself of the act in bringing this action, which was subject to the provision, as held by the Court of Appeals, that it could only be brought and maintained 'in the same manner and within the same time as if brought by citizens of this state in relation to their private individual property and rights.' Under the circumstances, the fact that the plaintiff was an Indian tribe cannot make federal questions of the correct construction of the Act and the bar of the statute of limitations.

"It appears that the decision of the Court of Appeals was rested, in addition to other grounds, upon a distinct and independent ground, not involving any federal question, and sufficient in itself to maintain the judgment, the writ of error falls within the well settled rules on the subject, and cannot be maintained. *Eustis* v. *Bolles*, 150 U. S. 361; *Gillis* v. *Stinchfield*, 159 U. S. 658. Writ of error denied."

On the same page petitioner says: "The question is, whether their rights have been impaired, and if so, whether there is a remedy?"

We have already shown they were afforded two remedies under the state law, the one by making proper application to the board of county commissioners before they paid the tax for the proper certificate relieving the allottees from paying the tax found either on the assessment or tax roll, which it does not appear they invoked. The other was by application to the different municipalities after they had paid the tax for allowance of a claim for such taxes received by the respective municipality with whom such itemized claim was filed, which remedy they failed to follow in that they demanded all taxes of one municipality, the county, which properly refused to allow the claim in that it included in a lump sum taxes received by the state and other municipalities, other than the county. If they were entitled to maintain a suit in equity seeking equitable relief, their remedy was in a court of equity, not in a proceeding before a board of county commissioners having no equitable jurisdiction, and appealing to the district court of the county which took on appeal only the jurisdiction of the board and none other. Any municipality that received the taxes, except the state, could be sued in a court of competent jurisdiction.

In the case of *United States* v. *Chehalis County*, 217 Fed. 285, cited at pages 22-23 of petitioner's brief, it is to be noted that in that case suit was originally brought in a court of original equity jurisdiction, and not under a special state procedure before a board of county commissioners having no equity jurisdiction, that in that case the county and county treasurer were defendants; that in this proceeding the county treasurer who collected and paid out the taxes is not a party; that in that case certain taxes paid were sought to be collected, and it does not appear that any other taxes than those paid the county were sought to be collected, but if they were, the question of the liability of the county for other than county taxes does not appear to have been presented or considered.

In that case the United States commenced the action on behalf of the Indians, while in this proceeding (Transcript of Record 3) it appears to have been instituted by C. A. Greenless, Trustee, who does not appear to be an Indian, and as to interest it is not instituted on behalf of the Indians, but on behalf of said Greenless, each claim being assigned to him (R. 14, 16-200), with authorization "to sue and collect said demand in his own name," and when collected 50 per cent to be paid by him to the allottee, his assignor. So that if the county commissioners had allowed the claims to Greenless and paid the same to him, and had the

Indian assignor been incompetent, or had his guardian made the assignment without approval of the proper probate court, no such approval being shown in the petition, the county commissioners knew, if they allowed the claims to Greenless, the Indian would never get over one-half of the amount of tax paid by him, and had no assurance that he would receive that. So that when the claim was again presented on behalf of the Indian by a proper authority the county might be compelled to pay it to him, and if the United States should prosecute a suit on behalf of the Indians it might recover all the taxes again from the county which it had paid Greenless. This, therefore, is another valid reason why the board should be upheld in its action in refusing to pay these taxes to Greenless. Therefore, it may well be that the rule that taxes voluntarily paid cannot be recovered back, is made for the benefit of the state, has no application to a suit by the United States in a Federal court, under the circumstances in that case, but Greenless is not the United States, neither are the Indian allottees, and as to them the state rules apply while they pursue state remedies before state boards and courts.

Seneca Nation of Indians v. *Christy*, 162 U. S. 283, *supra*.

The burden is on the assignee to show the competency of his assignor:

Schinotti v. *Cuddy*, 55 N. Y. Supl. 219.

Petitioner says at page 30 of his brief:

"In this case the recipient of the coercive measures and acts are Indian citizens. * * *the fact that the Indians belong to a class of people who are not well informed of their rights and therefore the necessity of liberal construction in determining all questions touching their persons and property. The Indian citizen is not on an equal footing with the county and its officers, and such inequality must be made good by superior justice."

Well, if this be true as between the Indian and the respondent county, why is it not also true as between the Indian and the petitioner, Greenless, to whom all these claims are assigned and who sought in this proceeding to have allowed and paid to himself by the county all of these claims.

If the Indian was incompetent to make a voluntary payment of the tax in the first instance, what made him competent to assign his claim for all taxes paid to Greenless, and to voluntarily give Greenless one-half of what he collected, and run the risk of Greenless giving the other half, after Greenless had received it, to the Indian.

William Cameron & Co. v. *Yarby*, 175 Pac. 206 (Okla.), holding:

"1. A guardian cannot make a contract which will bind the person or estate of his ward, unless authorized by a court of competent jurisdiction to enter into said agreement."

So far as appears from the transcript of the record, pages

5-202, no Indian allottee has yet filed his claim for taxes paid on his non-taxable land with the county clerk to be allowed by the respondent board and paid by the county, to the Indian allottee; neither has any guardian of any incompetent Indian filed a claim for such allowance of taxes paid on his ward's allotment, to be repaid to the guardian; but on the contrary all such taxes are assigned to and the claims filed show on their face they are to be paid to Greenless.

These things appearing on the face of the claims filed and the petition, its sufficiency was presented by demurrer, (Transcript of Record, 204-5), and there was no error in either the board rejecting the claims, or in the judgment of the Supreme Court to the effect that the demurrer should have been sustained by the District Court.

Therefore, there is no error in the holding in the second paragraph of the opinion by the Supreme Court of Oklahoma (R. 211).

It is evident from the petition that the Indians who paid the taxes knew they were Indians, knew that they had been allotted the lands upon which the taxes were assessed, and knew all the facts, and what they did not know was the law, and whether as purely a question of law the provisions of the Act of June 28, 1898 (30 St. 495), rendering their allotments non-taxable, had been taken away by the later Act of

Congress of May 27, 1908, sections 1 and 4, of which apparently made the allotments taxable (35 St. 312).

It is the rule of law in Oklahoma that taxes paid under mistake of law cannot be recovered back.

Johnson v. *Grady County*, 50 Okl. 188, 150 Pac. 497, holding:

> "4. Where a person voluntarily pays taxes to the county or state, however erroneous the assessment may be, the taxes so paid cannot be recovered unless such taxes were paid under a mistake of fact, and not of law; * * *."

Louisiana Realty Co. v. *City of McAlester*, 25 Okl. 726.

It is a rule of law in Oklahoma that payment of a tax on real property made not under mistake of fact is voluntary, and, under the revenue laws of Oklahoma, it is not made under coercion or duress.

Johnson v. *Grady County*, 50 Okla. 188, holding:

> "14. A party cannot successfully plead coercion or duress in the payment of a tax on real property."

A tax sale of land for delinquent taxes, where the land is non-taxable, and a tax deed issued on such sale is void in Oklahoma and conveys no title.

Hutchinson v. *Brown*, 167 Pac. 624.
Davenport v. *Doyle*, 57 Okla. 341.

And the holder of such a void tax deed could not

make the same the basis of an action to quiet title to the land.

Spalding v. *Hill*, 47 Okla. 621.

And where plaintiff brings action to quiet title to land, and his title thereto is founded on a void deed, and obtains judgment by default, in Oklahoma such a judgment would be void.

Clark v. *Holmes*, 31 Okla. 164.
Lewis v. *Clements*, 21 Okla. 167.

It is therefore plain that if the Indians had known the law and that the Act of May 27, 1908, did not make their lands taxable they would not have paid the tax, and by reason of non-payment they could have suffered no injury either in their person or property, for those who did not pay their taxes on their allotments were not compelled to pay them, and no valid claim could be made or enforced against their lands or title by reason of such non-payment.

That the Supreme Court of Oklahoma was right in its holding in the second paragraph of the opinion (R. 211) is also shown by the following cases, as well as in the cases cited in the opinion itself, (Transcript of the Record, 214-218):

Phillips v. *Board of Comrs. Jefferson County*, 5 Kans. 412:

In that case money was paid to the county treasurer to

redeem tax sale certificate of land sold for taxes, which were Indian lands, and not liable to assessment and taxation, and at the same time said money was so paid, the owner of the land denied the legality of the tax, on the ground that the lands were not taxable, and paid the money to prevent tax deeds, which were then due, from being made for said lands, and it was held that such payment was voluntary, and could not be recovered back.

It is to be noted that the allegation that at the time said tax was paid, the owner denied the legality of the tax, does not make the payment an involuntary one, as is shown by the last case cited. That case has been cited and followed by the Supreme Court of the United States in the case of *Lamborn* v. *Board of County Commissioners*, 97 U. S. 181, in which case certain lands had been taxed before a patent had been issued therefor, the Supreme Court of Kansas had held the taxes legal, and the lands were bid in by the county for taxes. The taxes were paid by plaintiff in ignorance of the fact that the lands were not taxable, and afterward the Supreme Court of the United States reversed the Supreme Court of Kansas and held the lands not taxable, and thereafter suit was brought to recover the taxes paid.

It is to be noted that the circumstances in that case are almost identical with those alleged in the petition in case at bar (Transcript of Record, pages 5-13), except that in that

case there was no protest made upon payment of taxes, and in this case there had been no tax sale. In both cases the lands were non-taxable, in both cases the state court had held the lands taxable, and in both cases the action was instituted to recover the tax paid, after the United States Supreme Court had reversed the state court, and had held the land non-taxable.

In the opinion by Mr. Justice Bradley it is said with reference as to whether the tax could be recovered back:

> "There are only three grounds on which such recovery can be maintained: Fraud, mistake or duress. No fraud is charged."

So in case at bar it is to be noted that petitioner charges no fraud in his petition.

The court next considers the question of mistake.

> "Mistake, in order to be a ground of recovery must be a mistake of fact, and not of law. Such at least is the general rule. 3 Pars. Cont. 398; *Hunt* v. *Rousmaniere*, 1 Pet. 1; *Bilbie* v. *Lumley*, 2 East 469 (cited); 2 Smith L. Cas. 398, 6th Ed. 458, notes to *Marriot* v. *Hompton*. A voluntary payment made with full knowledge of all the facts and circumstances of the case, though made under a mistaken view of the law, cannot be revoked and the money so paid cannot be recovered back (citing cases.) * * *
>
> "In the present case, there is no dispute, that all the facts and circumstances of the case, bearing on the question of the validity of the tax, were fully known to the plaintiff. He professedly relied on the law, as declared

by the Supreme Court of Kansas, and supposed that the tax was legal and valid."

Mr. Justice Bradley next proceeds to a consideration of duress in the opinion as follows:

"But it has been questioned whether a sale or threatened sale of land for an illegal tax is within this rule, there being no seizure of the property, and nothing supervening upon the sale except a cloud on the title. In *Phillips* v. *Jefferson Co.*, 5 Kans. 412, certain Indian lands, not legally taxable, were nevertheless assessed and sold for taxes, and a certificate issued to the purchaser. Phillips having acquired title to the land, paid the amount of said tax, at the same time denying their legality, and saying that he paid the money to prevent tax deeds from issuing on the certificates. The court held that the payment was purely voluntary, and add: 'The money was not paid on compulsion or extorted as a condition. A tax deed had been due for nearly two years. Had the plaintiff desired to litigate the question he could have done so without paying the money; even had a deed been made out on the tax certificate, it would have been set aside by appropriate proceedings. There was no legal ground for apprehending any danger on the part of the plaintiff. He could have litigated the case as well before as after payment. Neither his person or property was menaced by legal process. Regarding, then, the payment as purely voluntary, it is as certain as any principle of law can be that it could not be recovered back.'

"It seems to us that this case is precisely parallel with the one before us. We are unable to perceive any distinction between them. And as it is the law of Kansas, which we are called upon to administer, the settled decisions of its Supreme Court, upon the very matter, are entitled to the highest respect."

The Court in that case, as indicated, regarded the question as to whether the payment was under duress or voluntary, one of general law, and as the case had its origin in Kansas, such question was to be determined by the Kansas decisions. So in case at bar, the question being one of general law, and the case having its origin in Oklahoma, the decisions of Oklahoma are to be considered with equal authority upon the question, in this case, as the Kansas decisions were in that case, and as they follow the Kansas cases, it should be determined that the payment in this case was voluntary. In that case the court at the end of the opinion made the following conclusion:

> "In conclusion, our judgment is, that the question submitted by the Circuit Court must be answered as follows:
>
> "To the first: That judgment should be rendered for the defendant.
>
> "To the second: That the acquisition of the tax certificates and the subsequent payment of the taxes by the plaintiff were a voluntary payment, in such a sense as to defeat the right to recover in this action.
>
> "To the third: That the statute of Kansas referred to in the opinion, does not, upon the facts found, give the plaintiff the right to recover in respect of the causes of action set out in the opinion."

Which conclusions are equally applicable here, and show that the question is one of general law and that the decis-

ions of Oklahoma thereupon and upon the Oklahoma statute should prevail, with the result found in that case.

And the fact that the Indians who paid the taxes protested at the time of payment could not make the payment, under the conditions recited in the petition, an involuntary one further appears from the case of,

Union Pac. R. Co. v. *County Commissioners of Dodge County,* 98 U. S. 541, in which case it appears that certain lands in Nebraska had been taxed under the general taxation and revenue laws of that state, which are very similar to those of Oklahoma, which lands were not subject to taxation, as patent had not issued therefor, the company paid the taxes, protesting at the time in writing, and brought suit to recover the taxes back.

In holding that the taxes were voluntarily paid and could not be recovered back, Mr. Justice Waite says in the opinion:

> "We had occasion to consider the same general subject at the last term in the case of *Lamborn* v. *Comrs.*, * * * which came up on a certificate of division from Kansas. As that was a case from Kansas, we followed the rule adopted by the courts of that state, which is thus stated in *Wabaunsee Co.* v. *Walker,* 8 Kans. 431:
>
> "'Where a party pays an illegal demand with a full knowledge of all the facts which render such demand illegal, without an immediate and urgent necessity therefor, or unless to release his person or property, such payment must be deemed voluntary and cannot be re-

covered back. And the fact that the party at the time of making the payment files a written protest does not make the payment involuntary.' "

At the close of the opinion it is further stated:

"Under such circumstances, we cannot hold that the payment was compulsory in such a sense as to give a right to the present action. As the answer to this question disposes of the case, it is unnecessary to consider the other questions certified. * * *"

Therefore, we contend that the determination of this question of general law by the Supreme Court of Oklahoma, namely, voluntary payment, is broad enough to sustain its judgment, and the consideration of any other questions is unnecessary in this case.

In *Chesborough* v. *United States*, 192 U. S. 253, at 259, it is said:

"The rule is firmly established that taxes voluntarily paid cannot be recovered back, and payments with knowledge and without compulsion are voluntary."

United States v. *New York & Cuba Mail Steamship Company*, 200 U. S. 488.

United States v. *Edmonson*, 181 U. S. 500, to the effect that the payment of an excessive amount for government lands to government officers being voluntary and under a mutual mistake of law is not recoverable.

In *Little* v. *Bowers*, 134 U. S. 547, the court quotes and follows *Waubaunsee County* v. *Walker*, 8 Kans. 431, deciding the question of general law that the taxes were volun-

tarily paid and could not be recovered back, and sustained the motion to dismiss the writ of error.

Willis v. *Austin, Tax Collector*, 53 Cal. 152, holding:

"A tax deed which is void upon its face does not throw a cloud upon the title, and a threat of the tax collector to sell property and execute such a deed, does not amount to duress.

"The payment of taxes when there is no legal duress, will be deemed to have been voluntary, and the money cannot be recovered back."

The Sonoma County Tax Case, *San Francisco & N. R. Co* v. *Dinwiddie et al.*, 13 Fed. 789, holding:

"1. An assessment made in strict accordance with the provisions of the state constitution relating to the assessment of railroad property which violates the provisions of the fourteenth amendment to the constitution of the United States is void.

"2. A payment under it is not a payment under duress, but is voluntary and cannot be recovered."

The action was to recover something over $18,000, paid to plaintiff by defendant Dinwiddie, as tax collector of Sonoma County, under protest; for taxes assessed for the fiscal year 1881-1882. The complaint alleged that "Dinwiddie advertised the said property assessed, being the franchise, road-way, road-bed, rails and rolling stock, for sale for said taxes so assessed, and threatened to sell said property, when, to prevent a sale and save its property, and to prevent a

cloud being cast upon its title, the plaintiff paid the amount of the tax under protest."

On the point of voluntary payment we quote from the opinion the following:

"As the assessment was utterly void, it would have afforded no justification for a forced collection of the tax. Being void, as plaintiff alleges that it is, it is insisted by the defendants that the payment was voluntary, and, being so, the money paid cannot be recovered from defendants. This is clearly a voluntary payment within the rule laid down by the supreme court of California in *Bucknall* v. *Story*, 46 Cal. 599. It cannot be distinguished from that case. There was no possession of the property in the tax collector to be released in this case. He had never seized and he did not detain, and he did not even threaten to seize or detain any property. He was simply proceeding to sell property out of his possession upon an assessment of a tax that was wholly void upon its face. Neither the sale nor a conveyance under it could create any cloud on the title. The facts were fully known to the plaintiff, and the plaintiff at least maintained that the assessment and proceedings were absolutely void; and on this proposition plaintiff turns out to be right. The assessment was claimed to be void, and it was on that very ground that the plaintiff objected to the sale, and paid the money under protest. The means of knowledge of plaintiff were equal to those of the tax collector. * * * The plaintiff was bound to know the law. If the plaintiff paid, when there was no actual seizure or restraint of its goods, merely from a fear that it might be mistaken as to the law, it acted upon its own judgment as to what was the best course to pursue. It was merely a question of policy and not coercion. If there was a mistake on its part, it was a mistake of law, which it was bound to know, and not a mistake of fact. It was, in fact, right in its view of the

law. At all events the payment was clearly voluntary under the laws of California as settled in *Bucknell* v. *Story, supra,* and we know of no subsequent decision of the Supreme Court of the state to the contrary. This being the law of the state we are required to follow it. * * * So, also, there was no duress, as that term is defined in the Civil Code, sec. 1569. There was, certainly no duress of the person, and there was no 'detention of property' at all, it never having been seized, and, consequently, no 'unlawful detention of the property of the plaintiff.' "

The demurrer to the complaint was sustained.

Compare Civil Code sec. 1569 of California, cited in the opinion, *supra,* with sec. 900 of Rev. Laws of Okla. 1910, providing:

"Duress consists in:

"First. Unlawful confinement of the person of the party, or of husband or wife of such party, or of an ancestor, descendant, or adopted child of such party, husband or wife.

"Second. Unlawful detention of the property of such person; or,

"Third. Confinement of such person, lawful in form, but fraudulently obtained, or fraudulently made unjustly, harrassing, or oppressive."

Brunson v. *Board of Directors of Crawford County,* 107 Ark. 24, holding:

"1. The payment by one of illegal taxes with knowledge of the facts, and without any immediate and urgent necessity therefor, and not made to release his person or property from detention, nor to prevent an immediate

seizure of his person or property, is voluntary, and he cannot recover back the money paid."

Citing:

Lamborn v. *County Commissioners*, 97 U. S. 181,
Union Pacific R. Co. v. *Dodge County*, 98 U. S. 541.

Davie's Ex'rs v. *City of Galveston*, 16 Tex. Civ. App. 13, 41 S. W. 145, holding:

"3. Since a deed from a tax collector of the City of Galveston to a purchaser at a tax sale of land is no evidence of title without proof of all the jurisdictional prerequisites, the payment of the tax to avoid such sale, though made under protest, and with notice that the payor will sue to recover it, is not a compulsory payment."

On this point we quote from the opinion:

"The appellants, when they paid the taxes complained of, were in the undisturbed possession of their properties, and the tax collector was without power to disturb their possession; nor could a purchaser at tax sale eject them from the lands, except by a judgment of a court of competent jurisdiction, and, to entitle the purchaser to such judgment, he would be compelled to prove that the taxes for which the lots were sold were levied by the city council, and that the tax was legal, and that, in making the sale, the collector complied with all the requirements of the law necessary to empower him to make the sale. In such a suit, the appellants, it seems, would be in better position than in a suit to recover back the taxes. The appellants cannot be said to have been under compulsion. There was no immediate danger to themselves or their property constraining them to pay the taxes, and the payment must be held to be

voluntary, notwithstanding their protest and notice to the collector that suits would be instituted against the city to recover back the money."

Cincinnati, N. O. & T. P. R. Co. v. *Hamilton County,* 120 Tenn, 1, 113 S. W. 261, holding:

"2. A payment of taxes in order to be involuntary, so as to entitle the taxpayer to recover them for illegality, must be made on compulsion to prevent an immediate seizure of the taxpayer's goods or the arrest of his person; mere threats of litigation or apprehension of levy of distress warrants being insufficient.

"3. Payment of illegal taxes under protest before the taxes had become delinquent and without any demand or threat to levy merely to prevent the imposition of a penalty and interest which would accrue on the succeeding day was voluntary, so that the taxes paid could not be recovered."

Walser v. *Board of Education,* 160 Ill. 272, 43 N. E. 346, holding:

"4. A payment made to prevent the sale of real estate for an illegal tax is a voluntary payment."

We quote from the opinion:

"To recover from a municipality taxes illegally collected and paid over, the tax must have been illegal and void, paid under compulsion, or, what would be equivalent thereto, received to the use of the municipality from the collecting officer. *Elston* v. *City of Chicago, supra* (40 Ill. 514); *Railroad Co.* v. *Commissioners,* 98 U. S. 541; *Preston* v. *City of Boston,* 12 Pick. 15. The tax in this case was illegal and void, and received from the collecting officer by and for the use of the municipality, as appears from the averments of the bill. This would not be sufficient, but it must further appear that the pay-

ment was compulsory. A payment made to prevent the sale of real estate for an illegal tax is not under compulsion, but must be regarded as voluntary. *Stover* v. *Mitchell*, 45 Ill. 213; *Falls* v. *City of Cairo*, 58 Ill. 403."

The above language is quoted and followed in the case of *Otis* v. *People*, 196 Ill. 542, 63 N. E. 1053, at 1054.

Robinson v. *Kittitas County*, 101 Wash. 422, 172 Pac. 553, holding:

"The grantee of an Indian homesteader, or his heirs, could not recover back from the county money voluntarily paid for taxes assessed on the land under mistake of law by the county, acting under a claim of right and without fraud; there having been no ignorance or mistake of fact."

In that case the Indian became entitled to a patent under the Acts of Congress by the terms of which the land was inalienable and untaxable for a period of 25 years, and a patent was executed to him, which by mistake did not recite the facts that the land was inalienable and non taxable for said period. The Indian sold the land within the period to Robinson who paid the taxes assessed thereon, and upon discovering that the land was non-taxable and inalienable the widow and heirs of Robinson brought action against the county to recover the taxes paid for the years 1904 to 1913.

We quote from the opinion affirming the action of the trial court in sustaining a demurrer to the complaint:

"* * * the governing principle in such cases is stated as follows:

" 'It is settled law that money paid in satisfaction of

an illegal tax to a municipal corporation, acting under claim of right and without fraud cannot, in the absence of a statute authorizing it, be recovered back, where the payment was not compelled by duress or coercion and there was no ignorance or mistake of fact on the part of one making such payment' (citing) *Pittock & Ledbetter Lumber Co.* v. *Skamania County,* 98 Wash. 145, 167 Pac. 108; *Phelps* v. *Tacoma,* 15 Wash. 367, 46 Pac. 400; Dillon, Mun. Corp. (5th Ed.), sec. 1617."

Gaar, Scott & Co. v. *Shannon* (Tex. Civ. App.), 115 S. W. 361, holding:

"6. One paying an illegal demand, with knowledge of the facts rendering the same illegal, without any immediate necessity therefor, and not to release his person or property from detention, or to prevent an immediate seizure, makes a voluntary payment which he cannot recover back, though at the time of making the payment he filed a written protest."

Koewing v. *Town of West Orange,* 89 N. J. Law 539, 99 Atl. 203, holding:

"2. Duress, for which a person may avoid a contract or recover back money paid under its influence, exists where one by an unlawful act of the beneficiary or his authorized agent, or by the act of some person with his knowledge, is constrained under circumstances which deprive him of the exercise of free will, to agree to, or to perform, the act sought to be avoided.

"3. The collection of taxes through threats by the authorities of a municipality to which they are owing, that unless the sum due is paid, the owner's right to redeem will be barred or foreclosed, does not amount to unlawful coercion, and is not duress.

"4. Payment is not rendered involuntary merely be-

cause the payer at the time makes a protest against the payment, and if money is paid under compulsion no protest is necessary to lay the foundation of an action to recover it; but, if there be doubt as to whether the payment was voluntary, the protest may be taken into account in determining that question.

"5. A voluntary payment cannot be recovered by the payer."

The definition of duress in the second paragraph of the above syllabus is quoted from the opinion in the case of, *In Re Meyer* (D. C.), 106 Fed., at page 831.

City of Houston v. *Feizer*, 76 Tex. 365, 13 S. W. 266, holding:

"Where a person pays an illegal tax which he believes to be unjust, and the legality of which he is not averse to testing, when no process has issued for its collection, the payment is voluntary, and he cannot recover the amount paid."

We quote the opinion in part on above point:

"That a tax voluntarily paid cannot be recovered, though it has not the semblance of legality, is well settled; and, as said by an elementary writer, 'every man is supposed to know the law, and, if he voluntarily makes a payment which the law would not compel him to make, he cannot afterwards assign his ignorance of the law as the reason why the state should furnish him with legal remedies to recover it back. * * * Mistake of fact can scarcely exist in such a case, except in connection with negligence; as the illegalities which render such a demand a nullity must appear from the records, and the tax-payer is just as much bound to inform himself what the records show or do not show as are the public au-

thorities. The rule of law is a rule of sound public policy also. It is a rule of quiet as well as of good faith, and precludes the courts being occupied in undoing the arrangements of parties which they have voluntarily made, and into which they have not been drawn by fraud or accident, or by an excusable ignorance of their legal rights and liabilities.' Cooley, Tax'n, 809."

Bristol v. *Town of Morganton*, 125 N. C. 365, 34 S. E. 512, holding:

"1. When a receiver of a bank pays taxes assessed against it, believing that the taxes were properly assessed against the bank instead of against the stockholders, he is bound by such act, whether it was right or wrong, as it was money paid under mistake of law, and cannot be recovered back."

Couch v. *Kansas City*, 127 Mo. 436, 30 S. W. 117, holding:

"Where the extension of the limits of a city is void, due to the unconstitutionality of the act authorizing it, taxes willingly paid to the city by the owners of property taken into its limits by the extension, being paid under a mistake of law, cannot be recovered."

Upon the question as to the mistake being one of law it is said:

"The facts are agreed to. Prior to the extension, the lands of the plaintiff and his assignors were without the limits of the city, and not subject to taxation for city purposes, and, the extension being illegal and void, the taxes thus assessed and paid were illegal. Nevertheless they were willingly paid and expended, with the other city taxes, for the common benefit of all the citizens who owned property within the extended limits. The counsel for appellant frankly concedes that they cannot be re-

covered, unless they were paid under a mistake of fact, or under a mistake of law mixed with a mistake of fact. We frankly confess our utter inability to discover where any mistake of fact comes into this case. The city authorities levied and collected this tax under the belief that the ordinance extending the city limits, and the statutes authorizing such ordinance, were legal and binding. It is not pretended that the plaintiff or his assignors were ignorant of the statute or of the ordinance passed in pursuance thereof, or of the fact that their lands were within the extended limits, or of any other material fact affecting the validity of these taxes. On the contrary they paid these taxes for precisely the same reason that the city authorities were induced to levy them,—because they believed that the ordinance extending the city limits and the statute authorizing the same were legal and binding. * * * This was a mistake as to the force and effect of the statute and ordinance, purely a mistake of law, unmixed with any mistake of fact, and the plaintiff cannot recover."

Cincinnati, R. & Ft. W. R. Co. v. *Wayne Tp.* (Ind. App.) 102 N. E. 865, holding:

"1. In the absence of statute, there can be no recovery of taxes voluntarily paid, even though paid under protest."

We quote from the opinion:

"Appellant does not indicate whether it bases its right to recover on the common law or on some provision of the statute. We will therefore consider first whether the complaint states a cause of action under the common law. 'It has long been the rule in this state that there can be no recovery for taxes voluntarily paid, even though paid under protest, unless there is a statute au-

thorizing such a recovery.' *Dunham* v. *Board, etc.*, 95 Ind. 182, 183, and authorities there cited."

Slimmer v. *Chickasaw County*, (Iowa), 118 N. W. 779, holding:

"2. The right of a taxpayer to recover erroneous or illegal taxes voluntarily paid does not exist at common law, but only by reason of Code, sec. 1417, requiring the board of supervisors to direct the treasurer to refund to the taxpayer any tax erroneously or illegally exacted or paid."

Commonwealth v. *Ferries Co.*, (Va.), 92 S. E. 804, holding:

"1. Generally taxes voluntarily paid cannot be recovered back in the absence of a statute providing for their repayment."

In the opinion it is said:

"The general rule is well settled that taxes voluntarily paid cannot be recovered back in the absence of a statute providing for their repayment."

Barrow v. *Prince Edward County* (Va.), 92 N. E. 910, holding:

"1. A county road and poor tax illegally assessed, and voluntarily paid, cannot be recovered at common law."

Howell v. *Board*, 6 Idaho 154.
Jenkins v. *Lima Township*, 17 Ind. 326.
Durham v. *Commissioners*, 95 Ind. 182.
Railway Co. v. *Township*, 55 Ind. App. 533.
Bristol v. *Morganton*, 125 N. C. 365.
City of Detroit v. *Martin*, 34 Mich. 170.

Powell v. *Bd. of Commissioners*, 46 Wis. 210.
Shane v. *City of St. Paul*, 26 Minn. 543.
Couch v. *Kansas City*, 127 Mo. 436.
Lester v. *Mayor, etc.*, 29 Md. 415.
Espy v. *Town of Ft. Madison*, 14 Iowa 226.
City of Detroit v. *Martin*, 34 Mich. 170.
Seldon v. *School District*, 24 Conn. 91.
Foorest v. *Mayor, etc.*, 13 Abb. Pr. (N. Y.) 330 and at 352-53.
Fleetwood v. *City of N. Y.*, 2 Sandf. (N. Y) 475.
Railway Company v. *Marsh*, 12 N. Y. 308.
Bucknell v. *Story*, 46 Cal. 589.
Hoke v. *City of Atlanta*, 107 Ga. 416, and at p. 420.
Peebles v. *City of Pittsburg*, 101 Pa. St. 304.
Wahausee County v. *Walker*, 8 Kan. 431.
Davie's Executors v. *City of Galveston*, 16. Tex. Civ. App. 13.
Dickson County v. *Beardshear*, 38 Neb. 389.
Galveston City Co. v. *City of Galveston*, 56 Tex. 486.
Williams v. *Stewart*, 115 Ga. 86.
Kraft v. *City of Keokuk*, 14 Iowa 46.

Respondent respectfully submits that from all the foregoing that the Supreme Court of Oklahoma did not err in the 2nd paragraph of the syllabus and that the petitioner is not entitled to take anything by reason of his second specification of error and that this proceeding should be dismissed or the Supreme Court of Oklahoma affirmed.

POINT III.

Third Specification of Error.

This specification is considered at pages 31-36 of the petitioner's brief, and is as follows:

"The Oklahoma Supreme Court further erred in denying a recovery in this action since such judgment operates to deny the protection of the Federal exemption of tax secured under treaty contract with the Federal Government and protected by the Federal Constitution, Section 10, Article 1."

We have already shown that under the procedure adopted by petitioner and because of his negligence in not complying with its requirements he rendered the allowance of his claims by the board impossible under the state statutes governing such procedure which he had elected as his remedy. These matters are treated of at pages 37-42, 43-46 of this brief, *supra.*

We therefore fail to see wherein the action of the respondent board, or the action of the Supreme Court of Oklahoma results in abrogating and destroying the benefits of a Federal grant and impairing the treaty contract between the United States and the Indian. Petitioner after citing authority arrived at the conclusion at page 34 of his brief that:

"We, therefore, assert in all confidence that the contractual character of the tax exemption to the Indian citizen, is established in this case beyond all controversy."

We as respondent see no reason why petitioner should

not make the assertion "in all confidence" as it is not denied by respondent, and is admitted by the Supreme Court of Oklahoma in the very first words of the second paragraph of the syllabus to the opinion of which petitioner complains. For the words "Where certain citizens of the Choctaw and Chickasaw Nations paid certain taxes assessed against their respective allotments, which were non-taxable," (Transcript of Record p. 211) certainly imply that the allotments were non-taxable upon which these taxes were assessed and paid, and no one has yet disputed that the non-taxable character of the land arose out of the Atoka Agreement and the Act of Congress of June 28, 1898, as contended by petitioner.

The language of the court in the syllabus, last quoted, does not, we submit, afford any ground, even the most remote, for the next assertion made by petitioner at page 34 of his brief:

"The Supreme Court of Oklahoma repudiates the Federal Contract, which, by its own constitution, it was bound to protect and enforce. The treaty in question cannot be, and is not, a 'mere scrap of paper.'"

At page 35 of petitioner's brief, he again reverts to the statement "that to deny a remedy is in effect a denial of the right," but we again submit that a failure to follow appropriate and adequate remedies afforded, heretofore pointed out at pages 47-53 of this brief, *supra*, or a failure to

attain the desired relief, by reason of neglect and negligence in not following the plain requirements of the remedy attempted to be pursued, does not constitute a denial of a remedy to petitioner or a denial of his right, if, under the facts disclosed by the transcript of the record in this case, he has any right.

The question of a remedy being afforded is further considered under the following specification of error.

POINT IV.

Fourth Specification of Error.

This specification is considered by petitioner at pages 37-42 of his brief, and is as follows:

"The judgment of the Oklahoma Supreme Court is error for the reason that it denies relief for the violation and destruction of a vested property right and leaves petitioners without any remedy whatever. The right which is thus destroyed existing by virtue of a treaty with the United States and an Act of Congress such judgment of the state court not only overrides 'the due process clause,' but also denies operation of 'the equal protection clause' of the Federal Constitution, violative of the 5th and 14th amendments thereof."

If what is stated in the first sentence is true, what is said in the remainder of the paragraph is alleged by petitioner to follow.

Therefore according to the statement of petitioner if he was not denied a remedy, by reason of the decision complained of, the consequences enumerated by him do not

necessarily flow from the opinion of the Supreme Court of Oklahoma in this proceeding.

We assert that the Indian allottees were not deprived of a remedy, but that ample remedies were afforded them, and ample protection given them under the laws of the state of Oklahoma, as interpreted by its highest court.

In the first place there was no necessity of their paying taxes in question on their allotments. For had they not paid them, any tax sale of their lands, or any tax deed pretending to convey their allotments, because of the fact that their lands were non-taxable under the treaty and act of congress mentioned by petitioner in his brief, would have been absolutely void and conveyed no title and created no cloud upon the title of the Indians to their allotments, and could neither afford the basis of an action of ejectment to deprive him of the possession of his allotment, nor to quiet the title thereto in the tax deed holder, and likewise in Oklahoma a default judgment rendered against the allottee and based upon such a void deed would be null and void. This matter is considered at pages 65-66 of this brief, *supra*.

In the second place, the statutes referred to at pages 48-52 of this brief, *supra*, gave each Indian allottee a speedy and adequate remedy to avoid the payment of the tax assessed against his allotment, in any year in which it was

not taxable by applying to the board of county commissioners for the certificate provided for, upon presentation of which certificate to the county treasurer the same would be taken as a payment of or release from taxation of the premises for the period covered by such certificate. And this certificate could be applied for to avoid payment of the tax either while the same was on the assessment roll, or at any time after the tax was placed on the tax roll and was payable, or remained unpaid. It does not appear that any such a certificate was applied for by any of the allottees whose claims were assigned and presented by the assignee, Greenless, for allowance in this proceeding, for in neither the petition or claims is it shown such certificate was sought in any instance. If such remedy had been invoked under sects. 7353, 7354 of the Revised Laws of Oklahoma 1910, set forth at page 49 of this brief, *supra,* and the certificate had been refused by the board of county commissioners, an appeal would lie from its action to the district court of the county under sections 1640-1643 of said Laws, set forth at pages 50-51, *supra,* of this brief, and if its action had been adverse to the allottees, they could have appealed to the Supreme Court of Oklahoma, and if its action were adverse they could have appealed to this Court. But if the board of county commissioners of respondent county had allowed the certificate, or had it been allowed by the district court of the county or the Supreme Court of the state, the

allottees would never have paid the taxes in question, and would have had no claims for a refund of taxes paid to file with the respondent county or to be allowed or disallowed under the proceeding adopted by petitioner; which proceeding was to file the claims with the county clerk for allowance by the board of county commissioners under ch. 186 of Ses. Laws 1913, and sec. 1631 of the Revised Laws of Oklahoma, 1910, set out in this brief at pages 38-39, *supra*, and an appealed from the disallowance of the claims to the district court of the county (Transcript of the record 202-203) under sections 1640-1643 of the same laws set out at pages 50-51 of this brief, *supra*, where the question as to whether the respondent board of county commissioners had acted properly or improperly in rejecting the claims of petitioner was presented to the court by demurrer (Transcript of Record 203-204) and was decided adversely to the county, and appeal taken by the county to the supreme court of Oklahoma which upheld the board of county commissioners in its action disallowing these claims (Transcript of the Record 211-214), from which decision the petitioner prosecutes this writ (Transcript of Record 235).

Hence it appears that these Indian allottees had a speedy and adequate remedy for the protection of the rights mentioned in the third and fourth specifications of error, and if they failed in protecting such rights, it was not because of an adequate remedy not being afforded, but because

of their failure to avail themselves of the remedy afforded. This matter is considered in this brief at pages 47-53, *supra.*

In the third place in his quotation from the case of *Patton* v. *Brady*, 184 U. S. 608-614, at page 26 of petitioner's brief, he informs us that the remedy to recover back taxes illegally assessed and paid is "*in an action of assumpsit for money had and received.*"

However, it does not appear that the petitioner has ever resorted to this remedy, for the board of county commissioners of respondent county is not a court having jurisdiction of such actions, and its jurisdiction cannot be enlarged on appeal to the district court under the Oklahoma procedure, but the jurisdiction of the district court on appeal is the same as the board and none other as heretofore shown in this brief at pages 5-6, *supra.* And again this action would be defeated for the reasons heretofore pointed out in this brief in discussing the first and second specifications of error, and in the opinion of the Supreme Court of Oklahoma.

In the fourth place it is intimated that there is a remedy such as was invoked in the case of *United States* v. *Chehalis County*, 217 Fed. 285, cited at page 22 of petitioner's brief, that case was originally brought in a court of the United States, by the United States filing a bill in

equity, but this proceeding did not originate in a bill in equity, and the board of county commissioners had no jurisdiction to entertain such a bill if it had been so filed with them, and it does not appear that such bill was filed with a Federal court.

Therefore, whether there be such a remedy may be ascertained in some other case involving that question, but the question is of no moment here except for the purpose of showing that petitioner insists he has such a remedy for the protection of his rights, and has not availed himself of it.

This matter has been treated of heretofore at pages 61-64, 57-84 of this brief, *supra*. And we have heretofore attempted to show herein why there could be no recovery in the procedure adopted for the recovery of the taxes paid in this case, and wherein the Supreme Court of Oklahoma was right in the holding in the first paragraph of the syllabus to its opinion, and that if right therein the question therein decided is broad enough to dispose of the case without the consideration of any other questions decided by it, in the second paragraph of the syllabus.

We have also attempted to show that the Supreme Court of Oklahoma was right in its holding in the second paragraph of its opinion, and that therein it is supported

by ample authority including cases determined in this Honorable Court.

The jurisdiction of this court is challenged in our motion and brief to dismiss the writ herein, and we respectfully refer the Court thereto for a discussion of the questions therein involved.

Wherefore in view of all the foregoing the respondent herein prays this Honorable Court that the opinion of the Supreme Court of Oklahoma, in this proceeding be either affirmed or the writ of certiorari herein be dismissed, and that it be so ordered or adjudged.

Respectfully submitted,

T. B. WILKINS,
County Attorney of Love County, Oklahoma, Attorney for Respondent.

Of Counsel,
RUSSELL BROWN,
County Attorney of Carter County, Oklahoma,
GEO. B. RITTENHOUSE,
P. T. McVAY,
CLINTON A. GALBRAITH
of Coal County, Oklahoma,
and
GEORGE TRICE.

In the Supreme Court of the United States

No. 224.

COLEMAN J. WARD, by C. A. GREENLEES, *Assignee*,
Petitioner.

vs.

THE BOARD OF COUNTY COMMISSIONERS
OF LOVE COUNTY, OKLAHOMA,
Respondent.

MOTION TO DISMISS AND BRIEF ON BEHALF OF RESPONDENT

T. B. WILKINS,
Attorney for Respondent
CLINTON A. GALBRAITH,
GEORGE TRICE,
Of Counsel.

GEO. B. RITTENHOUSE,
P. T. MCVAY,
BASS & HARDY,
Amicus Curiae.

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POINT TWO.

POINT III.

In the Supreme Court of the United States

No. 7224.

COLEMAN J. WARD, by C. A. GREENLEES, *Assignee*,
Petitioner.

vs.

THE BOARD OF COUNTY COMMISSIONERS OF LOVE COUNTY, OKLAHOMA,
Respondent.

MOTION FOR PERMISSION TO FILE BRIEF AS AMICUS CURIAE.

Comes now the Board of County Commissioners of Coal County, Okla., by their attorneys, George Trice and C. A. Galbraith, and show to the Court that the above styled and numbered cause was an action in the court below by the assignee of certain tax payers who had paid money to the county treasurer of Love County, as

taxes assessed against their respective allotments as Indian citizens, for a refund of the money so paid; that large sums of money were collected as taxes from the owners of the same character of Indian lands by the treasurer of Coal county during the years 1909, 1910 and 1911, under the same conditions and circumstances as was done in Love county, Okla., and is liable to refund the same if the court should so decree in this cause; and that Coal county is, therefore, directly interested in the question to be determined in this cause; that a request was made upon George P. Glaze, Esq., attorney of record for the petitioner, but he withholds his consent to the granting of the request herein made for leave to file a brief in support of the respondent's contention in this case, as *Amicus Curiae;* that T. B. Wilkins, county attorney of Love county, who represented the respondent in said cause in the Supreme Court of Oklahoma has given his consent to the filing of such brief, as evidenced by his request in writing addressed to this Court, dated Marietta, Oklahoma, November 24th, 1919, attached hereto, marked "Exhibit A," and made a part hereof.

Wherefore, the Board of County Commissioners of Coal county, Oklahoma, pray that this Honorable Court make an order granting them leave to file brief in the above entitled and numbered cause, as *Amicus Curiae*, in support of the contentions of the respondent herein.

THE BOARD OF COUNTY COMMISSIONERS
OF COAL COUNTY, OKLAHOMA,
By CLINTON A. GALBRAITH,
GEORGE TRICE,
T. B. WILKINS, County Attorney,
Their Attorneys.

EXHIBIT "A".

IN THE SUPREME COURT OF THE UNITED STATES.

Coleman J. Ward, et al., Petitioner, vs. Board of County Commissioners of Love County, Oklahoma, Respondent. No. 7224.

To the Honorable, The Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Sirs: T. B. Wilkins, county attorney of Love county, Oklahoma, respondent in the above entitled and numbered cause, hereby consents that George Trice, Esquire, of Coalgate, Oklahoma, and C. A. Galbraith, of Ada, Oklahoma, special attorneys for Coal county, Oklahoma, may appear as Amicus Curiae in said cause on behalf of the respondent and file a brief and motion to dismiss the same, or a brief upon the merits, as to them may seem advisable.

Witness my hand at Marietta, Oklahoma, on this, the 24th day of November, 1919.

T. B. Wilkins,
County Attorney of Love County, Oklahoma.

In the Supreme Court of the United States.

Coleman J. Ward, by C. A. Greenlees, assignee, Petitioner, vs. The Board of County Commissioners of Love County, Oklahoma, Respondent. No. 7224.

Motion to Dismiss.

Comes now the Board of County Commissioners of Coal County, Oklahoma, by Clinton A. Galbraith and George Trice, its attorneys, and moves the Court to dismiss the writ herein for the reasons and upon the grounds following:

First: Because there is no federal question decided in the case.

Second: Because the Supreme Court of the State of Oklahoma decided the case against the plaintiff in error, the petitioner herein, on a matter of general law broad enough to sustain the judgment, and did not determine a federal question adversely to the petitioner.

Third: Because, even if it be conceded that the Supreme Court of the State of Oklahoma, decided a federal question in the case against the plaintiff in error, the petitioner herein, nevertheless, the court decided against him also upon an independent ground, not involving any federal question, and broad enough to support the judgment, and for that reason the federal question decided, if any, will not be considered here.

Wherefore, The Board of County Commissioners of Coal County, Oklahoma, pray that the writ herein and the proceedings for a review of said case be dismissed.

CLINTON A. GALBRAITH,
GEORGE TRICE,
Attorneys for Coal County, as Amicus Curiae.

T. B. WILKINS, *County Attorney.*
For Love County.

NOTICE.

IN THE SUPREME COURT OF THE UNITED STATES.

C. A. Greenlees, assignee, Petitioner, vs. The Board of County Commissioners of Love County Oklahoma, Respondent. No. 7224.

To J. E. Bennett and George P. Glaze, attorneys for plaintiff in error, the petitioner, C. A. Greenlees, assignee, plaintiff in error.

You will please take notice that in answer to your petition for a writ of certiorari in the Supreme Court of the United States filed in said court in the above entitled and numbered case on October 31st, 1918, and allowed by said court, respondent, The Board of County Commissioners of Coal County, Oklahoma, as amicus curiae, will on Monday the 5th day of January, 1920, at noon, or as soon thereafter as may be allowed by the

court, make a motion to dismiss said writ for the reasons set out in said motion.

CLINTON A. GALBRAITH,
GEORGE TRICE,

Attorneys for the Board of County Commissioners of Coal County, Oklahoma.

T. B. WILKINS, *County Attorney,*
For Love County.

SERVICE.

I, George P. Glaze, attorney for the petitioner, C. A. Greenlees, assignee, do hereby acknowledge service of the foregoing notice, motion, and the attached printed brief in support of such motion upon me as such attorney for petitioner this ____ day of December, 1919.

Attorney for Petitioner,
C. A. Greenlees, Assignee.

In the Supreme Court of the United States

COLEMAN J. WARD, by C. A. GREENLEES, Trustee, *Petitioner*,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF LOVE COUNTY, OKLAHOMA, *Respondent*.

BRIEF ON BEHALF OF RESPONDENT ON MOTION TO DISMISS.

STATEMENT OF CASE.

The lands allotted to citizens of the Choctaw and Chickasaw Nations of Indians in Oklahoma were exempt from taxation for a period of not exceeding twenty-one years from the date of patent by the Act of Congress of June 28th, 1898, (30 St. at Large, 495); notwithstanding this exemption taxes for State, County and other purposes for the years 1908, 1909, 1910 and 1911 were assessed against such lands in Love county, Oklahoma.

Upon learning that said lands had been assessed for

taxes for the year 1908 certain citizens of the Choctaw and Chickasaw Nations instituted suit in the Superior Court of Logan County, Oklahoma, to restrain the collection of said taxes upon said lands, and doing the things required by the revenue and taxation laws of the State of Oklahoma, with reference to the collection and assessing of such taxes. Such suit was decided adversely to the plaintiffs therein, and the cause was appealed to the Supreme Court of Oklahoma, which, on March 21st, 1911, sustained the trial court, holding such lands to be taxable. Thereupon the plaintiffs appealed said cause to the Supreme Court of the United States, where on May 12th, 1912, a decision was handed down reversing the decision of the Supreme Court of Oklahoma, holding that the said lands were not subject to taxation.

Choate et al. v. Trapp et al., 224 U. S. 665.

While said cause was pending in the several courts, and before it was finally determined in the Supreme Court of the United States, some of said Indians paid the tax assessed against their allotments for the years 1908, 1909, 1910 and 1911, to the county treasurer of Love county, Oklahoma, "fearing that the contention that said lands were taxable was true, but refusing to believe that same was true * * * said Indian citizens at the time of such payment objecting and protesting to said county treasurer * * * and for the further purpose of preventing the heavy penalties provided under the state law of Oklahoma from being imposed for non-payment of taxes and to prevent said lands from being sold for non-payment of taxes and in order to protect themselves from and against great loss and damage in the event said action so pending was decided against them, they paid such amounts" assessed against their lands for said years.

(Transcript of Record, page 14-200.)

The taxes for the year 1908 were paid between January 1 and July 1, 1909; the taxes for the year 1909 were paid between January 1 and July 1, 1910; that the taxes for the year 1910 were paid between January 1 and July 1, 1911; and the taxes for the year 1911 were paid between January 1 and July 1, 1912.

(Transcript of Record 10.)

The petitioner, C. A. Greenlees, plaintiff in error, does not claim to be a member of either the Choctaw or Chickasaw tribes of Indians, but does claim to be the assignee of sixty-seven (67) claims for taxes so paid, made to him by the various members of said tribes so paying the same as above set forth. These claims are alike with the exception of the name of the allottee, the description of the land, the years for which the taxes were paid, and the amount of such tax paid, and it appears therefrom that in most instances the taxes were not paid for all of the years 1908, 1909, 1910, and 1911 by the allottees, but for only certain of those years which vary in the different claims assigned. (Transcript of Record, pages 14-215.)

Petitioner, C. A. Greenlees, attempted to collect these claims for his own use and benefit by filing them, with his petition attached, with the county clerk of Love county for allowance by the board of county commissioners as a proper charge against said county on the 25th day of October, 1915, and more than two years after the last of said taxes are shown to have been paid. (Transcript of Record, page 202.) Each of said claims with the exception above pointed out being as follows:

"By reference plaintiff pleads all the matters alleged and set-forth in Exhibit "L" 1, hereto attached, filed herewith, and made a part hereof, as though set-forth herein at length, together with the verifications of said claim and the assignment thereof to plaintiff.

Plaintiff further alleges that no part of said claim has been paid him or anyone for him, and that the said demand is just, true, due and wholly unpaid.

AFFIDAVIT FOR REFUND OF ERRONEOUS TAX.

Roll A-11928.
Township 9 South, Range 1 East, Section 3.
Coleman J. Ward, Sex M; Blood 1/32; Age 19.

Description, S½ SW¼ NE¼, E½, SW¼ and NW¼; W½ SW¼ SE¼; S½ NE¼ NE¼ N½ SW¼ NE¼ E½ SW¼ NW¼ SW¼ NW¼; 1908 tax, $59.55, paid 3-28-11; 1909 tax, $38.88, paid 3-28-11. Total $98.43. State of Oklahoma, Love County."

Followed by the affidavit of the claimant.

This is followed by an assignment of the claim as follows:

"I, Coleman J. Ward, allottee as shown above, hereby assign and transfer the above demand and chose in action due claimant from Love county, Oklahoma, to C. A. Greenlees, who is hereby designated trustee for said claim, and authorized to sue and collect said demand in his own name. The consideration of this transfer is the agreement hereby made by the said C. A. Greenlees that he will employ the necessary counsel and incur the expense incident to such suits, proceedings and appeals as shall be necessary to recover said demand. In event of recovery herein said C. A. Greenlees shall first pay claimant 50 per cent of the tax, penalty and costs collected herein, or that proportion of the tax, penalty and costs so collected, and shall retain all of the remainder of the sums collected and accruing, which shall be his compensation for his services and expenditures herein. In event he recovers nothing, he shall receive nothing from claimant.

This contract shall be void within six months from date hereof, unless legal proceedings be instituted there-

on within that period. The terms of this contract are hereby accepted by the said C. A. Greenlees.

Dated this 13th day of September, 1915.

COLEMAN J. WARD,
C. A. GREENLEES."

"EXHIBIT 'L' 1."

Each claim so filed was disallowed by the Board of County Commissioners of Love County, November 3rd, 1915, and thereupon petitioner filed notice of appeal to the District Court of said county, and executed an appeal bond pursuant to the laws of Oklahoma, as in such case provided. (Transcript of the Record page 202).

In the District Court the Board of County Commissioners demurred to the petition because it was insufficient in law, and showed upon its face that no cause of action against the county was stated therein, and upon the further ground that it appeared from the face of said petition that each of the claims set-out therein was barred by the Statute of Limitations. (Transcript of the record, page 202 and 204.)

Said demurrer was overruled by the District Court, and the Board of County Commissioners refused to plead further, and judgment was entered for the claimants. (Transcript of Record 202.) An appeal was duly perfected from such judgment to the Supreme Court of the State.

On the 11th day of June, 1918, the Supreme Court handed down a decision in said cause reversing the judgment of the trial court upon the grounds that:

(1) There is no statute in Oklahoma imposing liability upon a county for taxes wrongfully collected by

its county treasurer and paid over to the state or a municipal subdivision thereof other than the county.

(2) That where taxes are assessed against the allotted lands of certain Choctaw and Chickasaw Indians, which were non-taxable, and in order to avoid threatened sales thereof, and to further avoid the imposition of penalities prescribed for failure to pay taxes when due, and where litigation was pending in the courts seeking to enjoin the collection of such taxes, and where the parties were fully informed as to the law making such lands non-taxable, and there was no immediate necessity for the payment of such taxes to prevent the seizure of the person or property of such persons, that a payment of such taxes was a voluntary payment, and in the absence of a statute expressly authorizing it cannot be recovered back.

The petitioner, plaintiff in error, brings the case here for review on writ of certiorari.

POINT 1.

There is no federal question decided in the case.

It is to be borne in mind, that the Indians who paid these taxes were not seeking to restrain their collection in this case, neither were they seeking to remove clouds from the title to their lands caused by taxes being levied thereon, tax sales thereof or tax deeds, none of these Indians were parties to this proceeding at any time. The money paid the county treasurer for taxes on their allotments, although paid by Indians, was not restricted by any treaty or Act of Congress, as to this money they had as complete and unrestricted control over it as any other citizen of Oklahoma has over his money, and might spend it as

they wished and might pay it to the county treasurer and thereafter assign a claim for such money, paid by them, to the petitioner, C. A. Greenlees, or any other person, without violating or drawing in question any Act of Congress, treaty or the Constitution of the United States. The Petitioner, C. A. Greenlees, is not an Indian; the only claim he pretended to have against the county of Love, was by reason of his being the assignee of the money so paid to the county treasurer as taxes on these allotted lands. Attention is called to the fact that in attempting to collect such money so paid from Love county petitioner did not proceed under any treaty, or federal statute or provision of the Constitution of the United States, but, on the contrary, attempted to invoked a state statute and follow the procedure prescribed by state law for the purpose of having his claims allowed by said county and in its opinion the Supreme Court of Oklahoma was not called upon to decide a federal question, but on the contrary, to decide whether or not in attempting to comply with the state procedure for the allowance of his claims against the county he had complied with such procedure so as to be entitled to the allowance of his claim. Upon this point their decision was as follows:

1.

"In the absence of a statute imposing liability therefor a county is not liable for taxes wrongfully collected by a county treasurer and by him paid over to the state or a municipal sub-division of the state other than the county against which liability is sought to be imposed.

2.

Where certain citizens of the Choctaw and Chickasaw Nations paid certain taxes assessed against their respective allotments, which were non-taxable, in order

to avoid a threatened sale of their lands and in order to avoid the imposition of penalties thereon for failure to pay said taxes and where at the time of said payment there was pending litigation seeking to enjoin the collection of said taxes, and where at the time said parties were fully informed as to the law which made said taxes illegal and there was no immediate necessity for the payment of said taxes to prevent a seizure of the person or property of said persons, Held: that said payment was voluntary, and in the absence of statutory authority therefor cannot be recovered back." (Transcript of record page 211).

That is, the Court decided that there was no statute in Oklahoma making the county liable for taxes wrongfully collected by the county treasurer and that taxes collected as were those alleged in the petition were voluntarily paid and denied a refund. In this determination no federal question was decided. The entire adjudication made by the Oklahoma Supreme Court in the case, related solely to state procedure which the petitioner, C. A. Greenlees, as assignee, had attempted to follow in seeking an allowance and payment of his claims against Love county. In so determining the court had in mind the taxing and revenue laws of the State of Oklahoma, by which the county treasurer is made the collecting agent for the state, and the municipal and quasi municipal subdivisions thereof, such as school districts, cities, towns, counties, etc., for the collection of taxes levied for their support, and that of the taxes collected by such county treasurer in any year, but a small part thereof was for the benefit of, or belonged to the county, and that this part was all that ever came into the hands of, or under the control of the county and was the only part ever received or used by it; that the county treasurer was required at short intervals to pay to the state the taxes collected by him for it, and likewise at short intervals to pay to all the

other municipal and quasi municipal corporations the taxes collected by him for them respectively, and that during the intervening months between July 1, 1912, when the last payment of taxes was made by petitioner's assignors, and October 25th, 1915, when he filed his claim as against the county of Love, under such laws the county treasurer would have long since paid out all the taxes so collected.

The Supreme Court of Oklahoma also evidently had in mind the provision of the statute of the state which petitioner was attempting to proceed under in his attempt to file a claim against the county for allowance by its Board of County Commissioners, which provides (R. L. Okla. 1910):

"Sec. 1631. No account shall be allowed by the County Commissioners unless the same shall be made out in separate items, and the nature of each item stated; * * * which account so made out shall be verified by affidavit setting forth that the same is just and correct and remains due and unpaid, which account shall be regularly filed with the county clerk five days before the first day of the meeting of the county commissioners. * * *"

Now the petitioner had verified his account as required by the law, which he had invoked and was trying to follow and he had also filed it, but he had failed to comply with the statute in that he did not itemize it showing what part of the taxes paid were paid for county levy, and what amount the county had received, and for what amount it was properly chargeable, and as the account was not so itemized so that the county commissioners might know what amount might properly be allowed as a charge against the county, they did not err in rejecting the claim for that reason in view of the procedure under which petitioner, C. A. Greenlees, was attempting to collect his claims, and the

Supreme Court of Oklahoma so holds in that part of its opinion above quoted. For it is to be noted that petitioner alleges in his petition (Transcript of Record, page 10), that the allotments were "assessed for taxation in the years 1908, 1909, 1910 and 1911 and for succeeding years," and in his different accounts he only gives the gross amount paid each year for all taxes assessed and levied against the land, which included taxes for all purposes, and does not itemize such account to show what part thereof was county tax and for what amount, if any, there was a proper charge against the county which the Board of County Commissioners would have authority to allow (Transcript of Record, pages 14-20).

The holding of the Supreme Court of Oklahoma in said cause was in conformity with the established interpretation placed upon said section by said court.

In *Smith* v. *Board of County Commissioners*, 56 Okla. 672, at 677, the section is quoted, and it is there said:

"No attempt was made in filing these claims of the county commissioners to comply with Section 1631, Rev. Laws 1910 * * * The first count of the amended petition was for money expended, but neither the amended petition nor the exhibit attached thereto set out the items of expenditure or the purpose thereof. * * * *"

And in that case, the action of the trial court in sustaining a demurrer to the petition because it failed to state a cause of action was affirmed.

In *Allen* v. *Commissioners of Pittsburg County*, 28 Okla. 773, in passing upon the authority of a board of county commissioners, and with reference to the manner in which claims should be made out for presentation to

them for allowance under the statute, at page 775, the following from the case of *Osterhoudt v. Rigney,* 98 N. Y. 232, is quoted with approval.

"But boards of audit in allowing accounts are limited to the powers conferred upon them by the statute; and when they transgress these limitations, their acts, like those of any other tribunal of limited jurisdiction, are void. If, for example, a board of town or county auditors should allow a claim which was plainly neither a town nor county charge, its determination would be void, for the reason that such charges only are within its jurisdiction. * * *

The same rule would follow if the account presented and allowed was one which the board, by reason of the omission of some indispensable condition, had no right to consider. For example, the statute declares that 'no account shall be audited by town auditors for any services and disbursements unless made out in items and verified by the claimant.' 'The object of these provisions is the protection of the taxpayers against false and fraudulent claim, and are clearly mandatory upon the board.' "

It is to be further noted that this case originated in the filing of the petition and claims with the Board of County Commissioners for allowance, and that from their disallowance of the claims an appeal was taken to the district court, and that under the procedure in such cases of the State of Oklahoma, as interpreted by its highest court, the district court takes appellate jurisdiction only, the same being confined to the jurisdiction of the board and none other, and that such appeal cannot be converted into an action in equity so as to enlarge the jurisdiction beyond that of the inferior tribunal.

Parker v. *Board of Commissioners,* 41 Okla. 723;

Bostock v. *Board of County Commissioners,* 19 Okla. 92.

As we have seen, the petitioner, C. A. Greenlees, in presenting his claim for allowance by the Board of County Commissioners of Love County, was attempting to follow the state procedure for the allowance of claims against the county. He was not claiming that such state procedure which he invoked was void by reason of being in conflict with any act of Congress, or any treaty or any provision of the Constitution of the United States, but, on the contrary, by invoking such procedure, he was impliedly insisting upon its validity. And in deciding that he was not entitled to the allowance of his claims, because he had neglected to properly follow the state procedure which he was attempting to follow, the Supreme Court of Oklahoma decided no federal question, it decided only a question of procedure under state law, in which no federal question was involved, and the ground upon which it thus decided the case was broad enough to prevent a recovery by petitioner and to sustain its judgment.

The points decided, as above set out, being upon the construction of a state law as to procedure in the presentation and allowance of claims against a county, and the validity of the statutes involved not being questioned, the Supreme Court of the United States has no jurisdiction to review the decision of the state court upon such question.

The Grand Gulf R. R., etc., Co. v. *Marshall*, 12 How. 165;
King v. State of West Va., 216 U. S. 92.

These rulings of the State Supreme Court, which are decisive of the case, are rulings involving questions of local pleading and practice under the laws of the state, with reference to the presentation, form and allowance of such claims by the county, and pertain only to such pleading and practice, and hence are not

the subject of review by the Supreme Court of the United States.

Brinkmeirer v. *Mo. Pac. Ry. Co.*, 224 U. S. 268, at 270.

Even when descent of allotted Creek Indian lands in Oklahoma is involved, rulings of the state court on matters of local pleading and practice are not reviewable by the Supreme Court of the United States.

Washington v. *Miller*, 235 U. S. 422, at 429.

The decision of the state court, above quoted, was upon matters dependent exclusively upon the law of the state and is conclusive upon the United States Supreme Court.

Bush v. *Person*, 18 How. 82, at 83.

Even were the Indian allottees bringing this proceeding and maintaining it under a state statute, they and this court would be bound by the decision of the state court construing and applying such state statute, as its decisions would involve no federal question.

Thus a decision of the highest court of a state that when an Indian tribe avails itself of the privilege given by a state statute to maintain suits in the state courts in the tribal name such tribe is bound by a limitation in the statute as to the time in which the suit must be brought, involves no federal question, and is not reviewable in the Supreme court of the United States.

Seneca Nation of Indians v. Christy, 162 U. S. 283, where in the opinion it is said, referring to the act of the state legislature under which the Seneca Nation had brought the action:

"The Seneca Nation availed itself of the act in bringing this action, which was subject to the provision, as held by the Court of Appeals, that it could only be brought and maintained 'in the same manner and within the same time as if brought by citizens of this state in

relation to their private individual property and rights.' Under the circumstances, the fact that the plaintiff was an Indian tribe cannot make federal questions of the correct construction of the act under the bar of the statute of limitations.

"It appears that the decision of the Court of Appeals was rested, in addition to other grounds, upon a distinct and independent ground, not involving any federal question, and sufficient in itself to maintain the judgment, the writ of error falls within the well settled rules on the subject, and cannot be maintained. *Eustis* v. *Bolles*, 150 U. S. 361; *Gillis* v. *Stinchfield*, 159 U. S. 658. Writ of error denied."

The judgment of the State Supreme Court, rendered after the taking effect of the Act of September 6, 1916, amending Section 237 of the Judicial Code, is reviewable by the United States Supreme Court, if at all, only by virtue of that act and in accordance with its provisions.

Rust Land & Lumber Co. v. *Jackson*, 39 Sup. Ct. Reptr. 424.

Therefore in deciding that the petition does not separate the amount of taxes paid so that it could be determined what portion was received by the county for which it might possibly be liable, the Supreme Court of Oklahoma did not decide any federal question, and the question decided by it was broad enough to support its judgment affirming the judgment of the district court sustaining the demurrer to the amended petition, and for this reason and for reasons heretofore pointed out, and under the authority of the cases above cited, there is no question presented for review by this court, reviewable under Section 237 of the Judicial Code, as amended, and hence the writ herein and this appeal should be dismissed.

POINT II.

The state court decided the case against the petitioner, on a matter of general law broad enough to sustain the judgment, and did not determine a federal question adversely to him.

What has been said, heretofore, with reference to the first ground for dismissal, is equally applicable to this second ground of the motion to dismiss.

The Supreme Court of Oklahoma further decided in its opinion with reference to the judgment of the district court overruling the demurrer to the petition, that:

In *Johnson* v. *Grady County, supra,* the action as to recover certain taxes paid to Grady County on lands allotted to a citizen of one of the Five Civilized Tribes. The payment in that case was held to be voluntary. Upon rehearing it was said:

"As to the second ground raised by plaintiff, relative to the recovery of taxes voluntarily paid, we note the distinction attempted to be drawn between an erroneous tax and an illegal tax; but we see no reason why we should recede from our former holding on this question, as our courts have spoken fully on that particular point and held against plaintiff's contention. See original opinion for authorities. The tax sought to be recovered in this case was paid upon land. It is difficult to see how a person could plead coercion or duress in the payment of such a tax. A tax upon personal property, or a franchise, might be coerced, but it appears impossible that such a contingency could arise in a land case, and most assuredly no duress, coercion or even protest has been shown in this case."

(Transcript of Record, pages 214-215.) The facts alleged showing under what circumstances the taxes were paid are set out in the opinion of the court (Transcript of Record, pages 213-214), and are recited in our statement of the case in this motion.

The syllabus to the opinion written by the court (Transcript of Record, page 211) is as follows:

I.

"In the absence of a statute imposing liability therefore a county is not liable for taxes wrongfully collected by a county treasurer and by him paid over to the state or a municipal subdivision of the state other than the county against which liability is sought to be imposed.

II.

"Where certain citizens of the Choctaw and Chickasaw Nations paid certain taxes assessed against their respective allotments, which were non-taxable, in order to avoid a threatened sale of their lands and in order to avoid the imposition of penalties thereon for failure to pay said taxes, and where at the time of said payment there was pending litigation seeking to enjoin the collection of said taxes, and where at the time said parties were fully informed as to the law which made said taxes illegal and there was no immediate necessity for the payment of said taxes to prevent a seizure of the person or property of said person, held: that said payment was voluntary, and in the absence of statutory authority therefor cannot be recovered back."

1. The only federal question contended for by petitioner, which question was that under the acts of Congress and Indian treaties, these lands allotted to Choctaw and Chickasaw citizens were non-taxable at the time the taxes were levied and paid, is not decided against the petitioner, but his contention is conceded to be true at the very beginning of the syllabus, and throughout the opinion. (Transcript of Record, pp. 211-218.)

This concession and admission would not give this court jurisdiction to review the decision of the state court, for the federal question was not actually decided

adversely to the party claiming a right under the federal law, as assignee of claims of Indians for taxes paid on their allotments which were non-taxable.

And further, the judgment as rendered could have been given without deciding any federal question, for, as rendered, the decision is founded upon state procedure as to presentment, form and allowance of claims against the county, as shown in our discussion of the first ground of this motion, and upon a proposition of general law as to what constitutes a voluntary payment of taxes, which precludes a recovery of taxes so paid, as shown by the syllabus and that part of the opinion last quoted.

That this court has no jurisdiction to review such decision, for the reasons above pointed out, appears from the following:

Eustis v. *Bolles*, 150 U. S. 361, where, at page 366, it is said in the opinion by Mr. Justice Shiras:

"It is settled law that, to give this court jurisdiction of a writ of error to a state court, it must appear affirmatively, not only that a federal question was presented for decision by the state court, but that its decision was necessary to the determination of the case, and that it was actually decided adversely to the party claiming a right under the federal law or Constitution, or that the judgment was rendered could not have been given without deciding it. *Murdock* v. *Memphis*, 20 Wall. 590; *Cook County* v. *Calumet & Chicago Canal Co.*, 138 U. S. 635."

See, also, *Fowler* v. *Lamson*, 164 U. S. 252, at 255.

Further, it is to be observed that the decision of the state court upon the face of the record is entirely consistent with the construction of the federal statute and Indian treaty contended for by petitioner, that the

land was non-taxable, and therefore no case is made out for the exercise of the appellate jurisdiction of this court.

Ocean Ins. Co. v. *Polleys*, 13 Pet. 157, at bottom of page 162, where it is said:

"If, therefore, the decision made by the state court is upon the face of the record entirely consistent with the construction of the statute contended for by the party appellant, no case is made out for the exercise of the appellate jurisdiction of this court."

Therefore, as the only construction placed upon the only federal question contended for by petitioner, C. A. Greenlees, was an admission of the correctness of his contention, he cannot claim that he was prejudiced by this admission which he induced the state court to make, and thereupon make the same the foundation for a writ to review the decision of the state court, and this being true, there is no federal question in the case for review, and the writ should be dismissed.

2. The next question is, does the determination that the tax was voluntarily paid, under the conditions shown in the petition of C. A. Greenlees, involve the determination of a federal question by the Supreme Court of the state which is reviewable by this court?

We are aware that it has been determined by this court that a tax may be exacted in such manner and by such means that its payment will not be considered voluntary, and it may be so imposed as to involve a federal question.

In *Atchison, Topeka & Santa Fe Ry. Co.* v. *O'Connor*, 223 U. S. 280, it appears that the railway company was a Kansas corporation and that a part of its property was situated in the State of Colorado, in which

latter state it had by complying with the laws then in force obtained a right to do business in the year 1897, and that thereafter, in 1907, the legislature of Colorado passed an act, which applied to the railway company, by which it was required to pay an additional license tax annually. A failure to pay this tax incurred (a) money penalties for delay in payment, (b) a forfeiture of right to do business, and (c) a risk of having contracts declared illegal in case of non-payment of the tax by the railroad company to avoid the consequences, enumerated, was under duress, and hence not voluntary, and, further, that the exaction thereof by such act was a violation of its constitutional rights under the circumstances and conditions set forth in the opinion.

In *Union Pac. R. Co.* v. *Pub. Service Com. of Mo.*, 39 Sup. Ct. Reptr. 24, the railway company was a Utah corporation, and it appears that a very small part of its property was situated in the state of Missouri; that the company, desiring to issue a large amount of bonds, made application for certificate authorizing such issue to the Public Service Commission of Missouri, the statutes of Missouri (a) prohibiting the issue of such bonds without the authority of the commission, (b) impose severe penalties for such issue, and (c) purport to invalidate the bonds if it take place. (d) The bonds would be unmarketable if the certificate were refused.

The railroad company, to avoid the consequences above enumerated, paid an excessive fee under protest for the certificate, and it was held that the payment was, under the circumstances, made under duress, and hence it was not voluntary, and that its exaction was an unlawful interference with commerce among the states.

It is to be noted in both of the foregoing cases that under the state law the parties making the payments were subject to make the same, and these cases are to be distinguished from a case where the property upon which the tax was paid was not subject to taxation, or where the party paying the tax was not subject to the tax, under the state law. Thus where under like penalties a corporation not subject to the tax pays the same, it cannot recover back the tax as paid under duress.

Garr, Scott & Company v. *Shannon*, 223 U. S. 468, where in the opinion it is said:

"While a payment of the tax by one included in the class to which a statute applies in order to avoid penalties and forfeitures, is compulsory, it is not so as to one not included in such class and payment thereof by such person is voluntary and not under duress."

In determining, therefore, whether the tax was paid under duress, or whether its payment was voluntary and cannot be recovered back, the question as to whether the property upon which it was paid was taxable under the state law at the time when such tax became delinquent and before which time of its becoming delinquent no penalty would attach, for its nonpayment, becomes very material and one of the determining facts in the case.

We will, therefore, proceed to the consideration of this question with reference to the allotted lands upon which the taxes in question were paid.

These lands, as shown by the allegations of the petition of the petitioner, C. A. Greenlees (Transcript of Record, pages 5-13), were assessed for taxation for state, county and other purposes under the revenue and taxation laws of Oklahoma for the years 1908, 1909, 1910 and 1911.

Under the laws of Oklahoma in force in 1908 the tax assessed for the year 1908 did not become delinquent until the third Monday in January, 1909.

Wilson's Rev. & Ann. St. Okla. 1903, Sec. (6013), provides:

"One-half of all taxes shall be due on the fifteenth day of June and the fifteenth day of December of each year, and on the third Monday of January following the assessment of taxes, all unpaid taxes shall become delinquent. All delinquent taxes shall, by the county treasurer, be advertised in some newspaper published in the county in which such taxes have become delinquent, * * * and all such delinquent taxes shall bear interest at the rate of eighteen per cent. per annum, and to all delinquent taxes shall be added the cost of advertising the same, but in no case shall any other penalties attach, * * *."

That is the tax levied for the year 1908 did not become delinquent and no penalty attached for non-payment and the person whose property was taxed was not required to pay the same until the third Monday in January, 1909. Before the date arrived for this tax to become delinquent, however, the state legislature passed an act which took effect upon the date of its approval on January 14, 1909, by which the time for the payment of taxes assessed for the year 1908 was extended so that such taxes did not become delinquent and no penalty for non-payment attached until the third Monday of April, 1909.

Session Laws of Oklahoma, 1909, Ch. 38, Art. IV, Sec. 1, page 627.

Section 1 of the act provides that:

"The time for the payment of the first half of the taxes levied for the fiscal year ending June thirtieth, nineteen hundred and nine, and for the deficiency for

the fiscal year ending June first, nineteen hundred and eight, is hereby extended until the third Monday of April, nineteen hundred and nine, and such taxes shall become delinquent after said third Monday in April, nineteen hundred and nine. * * *"

Before this tax became delinquent, however, under the above extension of time of payment and before the third Monday of April, 1909, the state legislature passed another act which took effect on the date of its approval on March 27, 1909, my which all such property as may be exempt by reason of treaty stipulations, existing between the Indians and the United States Government, or by federal law, during the force and effect of such treaties or federal laws, shall be exempt from taxation.

This Act, Ch. 38, Art. 1, Secs. 1 and 2, Sess. Laws Okla. 1909, pages 572-573, so far as material is as follows:

"Section 1. All property in this state, whether real or personal, including the property of corporations, banks and bankers, except such as is exempt, shall be subject to taxation.

"Section 2. The following property shall be exempt from taxation: * * *"

"8th. Such property as may be exempt by reason of treaty stipulations, existing between the Indians and the United States Government, or by federal laws, during the force and effect of such treaties or federal laws. * * *"

And by like provision in Section 6 of Art. X of the Constitution of Oklahoma, these lands were exempt from taxation. Vol. 1, R. L. Okla. 1910, page CIV.

It is therefore plain that the taxes under the assessment made for the year 1908 on these allotments never did become delinquent under the state law, and

that their non-payment never involved any penalty before the time the lands were specifically exempt from taxation under act of the legislature of March 27, 1909, and the law making them exempt has ever since its enactment and is now in force, being Section 7303 of the Revised Laws of Oklahoma, 1910, and such lands had been exempt from taxation since 1907, under Sec. 6 of Art. X of the State Constitution, and from this it is plain that these lands were not subject under State Constitution and statute to assessment for taxation for the years 1908, 1909, 1910 and 1911, the allotments in question being exempt from taxation under federal laws and treaty stipulations existing between the Indians and the United States Government as alleged by C. A. Greenlees in his petition (Transcript of Record, page 5), and hence being within the description of the state law of property exempt from taxation.

Moreover, it has been held by the Supreme Court of Oklahoma that the allotments of Choctaw and Chickasaw Indians were not taxable.

Wood v. *Gleason*, 43 Okla. 9.

And in several cases it has been held by the same court that allotments of Indians which were made exempt by federal law or Indian treaty with the United States Government from taxation were not taxable.

Whitmore v. *Trapp*, 33 Okla. 429;
Weilep v. *Audrain*, 36 Okla. 288;
Lieber v. *Rogers*, 37 Okla. 614;
Marcy v. *Board of County Commissioners*, 45 Okla. 1;
McGeisey v. *Board of County Commissioners*, 45 Okla. 10.

From all the foregoing it becomes apparent that none of the taxes paid on the allotments in question ever became delinquent under state law, and, further,

that the lands were under the State Constitution and statute exempt from all the taxes paid thereon, and, further, it is made to appear by the cases following that no penalty could have attached, and no valid proceeding could be had by which the title of the allottee could have been affected in any manner had the taxes not been paid.

In *Hutchinson* v. *Brown*, 167 Pac. 624 (Okla.), it is held in the syllabus by the court:

"Where, under the laws and treaties of the United States, an Indian homestead is exempt from taxation by a state and its subdivisions, a levy and assessment of taxes thereon, a sale of such lands for taxes, and tax sale certificate issued in pursuance of such sale, are absolute nullities; and the issuance and recording of a tax deed, based upon such void proceedings, does not set in operation the short statute of limitations against an action to recover such lands from a holder under such deed or to avoid such deed."

In the opinion, speaking of the effect of such exemption from taxation under the laws and treaties of the United States, it is said:

"This exemption is not subject to violation by the state tax laws or administrative officers, directly or indirectly. So far as the state taxing power is concerned, the exempt lands do not exist; and so far as the exempt lands are concerned, the taxing power does not exist. The land is as effectively without the pale of the tax laws and their administration as if they were located in another state. All proceedings of the taxing power, having as their effect a violation of this exemption, are without jurisdiction and void, and the tax deed based upon such proceedings is void."

No taxes, interest, penalties or costs could have been exacted had these taxes not been paid.

In *Davenport* v. *Doyle*, 57 Okla. 341, Indian lands which were exempt from taxation were sold for taxes for the year 1909, and tax deeds were issued. The Indian brought action to cancel and remove, as clouds upon his title, these tax deeds, and the same were cancelled and the clouds removed, the court holding that in bringing the action it was not necessary for him to tender or pay the taxes, interest, penalties and costs to redeem the land from tax sale, and that the tax deeds were void.

Had the allottees not paid these void taxes in question in this case, and had tax deeds been issued, as we have seen, the same would have been absolutely void and of no force or effect whatever, and being void a holder of such a tax deed could not even have made the same the foundation of an action to quiet his title to the premises conveyed by such a deed. For in Oklahoma an action to quiet title cannot be maintained upon a tax deed void upon its face. This is so held in the case of *Spalding* v. *Hill*, 47 Okla. 621, holding that:

"A tax deed void on its face vests in plaintiff no interest in the title to the land therein described, and as plaintiff must prevail on the strength of his own title, a judgment clearing his title thereto is void."

Therefore it appears not only that such a tax deed void on its face conveys no title, but that a judgment quieting the title to the tax deed holder in the land thereby conveyed, which is founded upon such a deed, would be void.

See last cited cases and also:

Clark v. *Holmes*, 31 Okla. 164;
Lewis v. *Clements*, 21 Okla. 167.

Therefore, where the thing upon which the tax was paid was exempt from taxation and the penalties for

non-payment, as here, under the provisions of the State Constitution and statute, one paying such a tax could not claim that such penalties constituted duress as to him, for the very good reason that they did not apply to him or his property and their consequences, under the state law, could not have followed if the tax had not been paid. For under the allegations of C. A. Greenlees's petition, heretofore mentioned, these allotments of the citizens of the Choctaw and Chickasaw Nations wre made exempt by act of Congress, approved June 28, 1898, and ratified by such nations December 1, 1898, and hence such lands under the provisions of the Oklahoma laws and Constitution, heretofore mentioned, were not included in the class of property to which the taxing and revenue laws of Oklahoma applied with reference to penalties for non-payment of taxes, sale of property for such non-payment, issue of certificates pursuant to such sale, and the issuance of tax deeds two years after the issuance of such certificates, on demand of the holder of such certificate and proper advertisement of application for such deeds, should the said certificates not be redeemed. These Indians merely paid a tax which did not apply to their lands, just as the plaintiff paid a tax which under the state law did not apply to and was not required of it in the case of *Garr, Scott & Co.* v. *Shannon*, 223 U. S. 468, where what is said in the opinion, as to the payment, in such a case, being voluntary and not recoverable, is especially applicable to the state of facts here upon the point now under consideration.

We quote from the opinion as follows in that case:

"Where a payment of the tax by one included in the class to which a statute applies in order to avoid penalties and forfeitures is compulsory, it is not so as to one not included in such class and payment thereof by such person is voluntary and not under duress."

"Where the state court decides that a corporation which claims that it only does an interstate business, but paid a tax levied only upon corporations doing an intrastate business made the payment not under duress, and the record shows that the question was fairly in the case, the judgment rests upon a ground of general law broad enough to sustain it."

We further quote from the opinion the law as especially applicable to the petition of C. A. Greenlees in the case at bar the following, bearing in mind what has been said as to these allotments not being taxable under the state law:

"3. If, therefore, the plaintiff had been included in the class to which this statute applied, and, under the duress of its automatically enforced provisions, had paid the tax to avoid the disruption of its business, it could have maintained an action to recover the amount thus exacted. In that suit it would have been entitled to a decision on the question as to whether the statute was constitutional, and to a review of the judgment if it had been adverse to the company's contention.

"But the company did not in any sense come within the purview of the act. The plaintiff alleged that it was engaged only in interstate commerce. If so, the statute did not require from it the payment of the tax. For the Supreme Court of Texas in *Allen* v. *Tyson-Jones Buggy Co.*, 91 Tex. 22, and *Miller* v. *Goodman*, 91 Tex. 41, has held that the franchise tax act had no application to corporations doing an interstate business. The duress of its provisions, therefore, operated only on those doing intrastate business; and if the plaintiff, on a mere demand, paid the tax imposed by a statute, applicable only to other corporations, it has no more right to recover than would a dry goods merchant who voluntarily paid a tax illegally imposed on those engaged in the selling of liquor.

"To permit those not affected by a statute to pay the sum thereby assessed, and then sue for its recovery on the ground that the act was void, would reverse the

rule that 'one who would strike down a state statute as violative of the Federal Constitution must bring himself by proper averments and showing within the class as to whom the act thus attacked is unconstitutional. He must show that the alleged unconstitutional features of the law injured him, and so operates as to deprive him of rights protected by the Federal Constitution." *Southern Railway Co.* v. *King*, 217 U. S. 524, 534.

"What we have said shows that the question as to voluntary payment fairly arose out of the record, and was not arbitrarily injected into the case. *Leathe* v. *Thomas*, 207 U. S. 93, 99.

"A decision on the non-federal point could properly dispose of the plaintiff's suit to recover back what it had paid. The judgment of the Civil Court of Appeals must, therefore, be affirmed."

The above case is cited as authority for the dismissal in the following cases:

Christopher v. *Munger*, 242 U. S. 611;
Zavaglia v. *Notarbartolo*, 243 U. S. 628.

In this case the question of voluntary payment arose fairly upon the record, the demurrer, one ground of which was a failure to allege facts sufficient to constitute a cause of action, and the petitioner cannot now claim reimbursement, the demurrer being overruled by the trial court, which judgment was reversed by the Supreme Court of the state (Transcript of Record, 205-211-219), while in the case of *Garr, Scott & Company* v. *Shannon*, the judgment sustaining a demurrer to the petition was affirmed by the state court, and there, as here, the state court held the payment voluntary. In both cases, as disclosed by the petition, the property was not liable to be taxed under the state law, upon which the taxes were paid, in both cases the payment upon a mere demand, of the tax imposed by statute, applicable only to others, did not render the payment involuntary and recoverable. And in both cases the de-

cision of the state court against the petitioner upon a matter of general law, that the payment was voluntarily made and not recoverable, was broad enough to sustain the judgment, and was upon a non-federal point.

But even if the allotments had been taxable under the provisions of the state law, there were no such drastic consequences attached to their non-payment, as to make their payment, a payment under duress, as in the case of *Atchison, Topeka & Santa Fe Ry. Co.* v. *O'Connor, supra,* and *Garr, Scott & Co.* v. *Shannon, supra,* where in addition to money penalties for delay, the right to do business was forfeited, and the risk incurred of having contracts declared illegal. Or is there such a penalty as attached in the case of *Union Pac. R. Co.* v. *Pub. Service Com. of Mo., supra,* where non-payment of fees rendered the bond issue invalid and unmarketable.

In case at bar the only consequences that would result from a non-payment of the tax were, as recited in the petition, heavy penalties added if taxes were not paid before the same became delinquent, and these penalties, as we have seen, were a charge of interest at eighteen per cent. per annum on delinquent taxes (Wilson's Rev. & Ann. St. Okla. 1903, Sec. 6013), and to prevent said lands from being sold for non-payment of taxes (Transcript of Record, bottom page 11). That is, if the taxes were not paid the lands were advertised and sold at public sale for the taxes and a tax certificate issued to the purchaser at such sale, and if the land was not redeemed within two years from such tax sale by payment of taxes, interest and costs, upon service of notice or advertisement therefor, the holder of tax sale certificate was entitled to receive a tax deed from the county treasurer (Revised Laws of Oklahoma, Sections 7383-7418).

The payment of taxes upon lands exempt therefrom to avoid the consequences of non-payment above mentioned, is a voluntary payment, and not one made under duress, and the tax cannot be recovered back.

Phillips v. *Board of Com'rs Jefferson County*, 5 Kans. 412.

In that case money was paid to the county treasurer to redeem tax sale certificates of land sold for taxes, which were Indian lands, and not liable to assessment and taxation, and at the same time said money was so paid, the owner of the land denied the legality of the tax, on the ground that the lands were not taxable, and paid the money to prevent tax deeds, which were then due, from being made for said lands, and it was held that such payment was voluntary, and could not be recovered back.

It is to be noted that the allegation that at the time said tax was paid, the owner denied the legality of the tax, does not make the payment an involuntary one, as is shown by the last case cited. That case has been cited and followed by the Supreme Court of the United States in the case of *Lamborn* v. *Board of County Commissioners*, 97 U. S. 181, in which case certain lands had been taxed before a patent had been issued therefor, the Supreme Court of Kansas had held the taxes legal, and the lands were bid in by the county for taxes. The taxes were paid by plaintiff in ignorance of the fact that the lands were not taxable, and afterward the Supreme Court of the United States reversed the Supreme Court of Kansas and held the lands not taxable, and thereafter suit was brought to recover the taxes paid.

It is to be noted that the circumstances in that case are almost identical with those alleged in the petition in the case at bar (Transcript of Record, pages 6, 7, 8, 9

and 10), except that in that case there was not protest made upon payment of taxes, and in this case there had been no tax sale, the allegation as to time of payment showing that same was made before tax became delinquent and penalties accrued under the tax laws of Oklahoma. In both cases the lands were non-taxable, in both cases the state court had held the lands taxable, and in both cases the action was instituted to recover the tax paid, after the United States Supreme Court had reversed the state court, and had held the land non-taxable.

In the opinion by Mr. Justice Bradley it is said with reference as to whether the tax could be recovered back:

"There are only three grounds on which such recovery can be maintained: Fraud, mistake or duress. No fraud is charged."

So in case at bar it is to be noted that petitioner charges no fraud in his petition.

The court next considers the question of mistake.

"Mistake, in order to be a ground of recovery, must be a mistake of fact, and not of law. Such, at least, is the general rule. 3 Pars. Cont. 398; *Hunt v. Rousmaniere,* 1 Pet. 1; *Bilbie* v. *Lumley,* 2 East. 469 (cited); 2 Smith L. Cas. 398, 6th Ed. 458, notes to *Marriot v. Hampton.* A voluntary payment made with full knowledge of all the facts and circumstances of the case, though made under a mistaken view of the law, cannot be revoked and the money so paid cannot be recovered back (citing cases). * * *

"In the present case, there is no dispute, that all the facts and circumstances of the case, bearing on the question of the validity of the tax, were fully known to the plaintiff. He professedly relied on the law, as declared by the Supreme Court of Kansas, and supposed that the tax was legal and valid."

So in case at bar the Indians, petitioner's assignors, knew the facts as disclosed by his petition; they knew that they were members of the Choctaw and Chickasaw Nations; knew that as members of such nations they had received allotments; knew that such allotments were exempt from taxation as recited in said petition by virtue of act of Congress, approved June 28, 1898, and duly ratified and agreed to by said nations on December 1, 1898, and knew that their allotments were assessed in 1908 (Transcript of Record, page 7); they knew that they had proceeded at once to enjoin said assessment and the collection of said tax by a suit brought in the superior court of Logan county, Oklahoma; they knew that the judgment was adverse to their contention, and knew that they had appealed from its judgment to the Supreme Court of Oklahoma, and that it had affirmed the lower court, and knew that they had appealed to the Supreme Court of the United States (Transcript of Record, 11). And they say, "while said action was pending in said several courts * * * fearing that said contention that said lands were taxable was true, but refusing to believe the same was true, paid the tax * * * (Transcript of Record page 11). It becomes at once apparent from the foregoing that there was no mistake as to the facts, but that the only mistake was as to the law, and whether under it the land was taxable and that the Indians, fearing the land was taxable under the law, paid the tax, hence the money was voluntarily paid and cannot be recovered back.

Mr. Justice Bradley next proceeds to a consideration of the question of duress in the opinion as follows:

"But it has been questioned whether a sale or threatened sale of land for an illegal tax is within this rule, there being no seizure of the property, and nothing supervening upon the sale except a cloud on the title.

In *Phillips* v. *Jefferson Co.*, 5 Kans. 412, certain Indian lands, not legally taxable, were, nevertheless, assessed and sold for taxes, and a certificate issued to the purchaser. Phillips having acquired title to the land, paid the amount of said tax, at the same time denying their legality, and saying that he paid the money to prevent tax deeds from issuing on the certificates. The court held that the payment was purely voluntary, and add: 'The money was not paid on compulsion or extorted as a condition. A tax deed had been due for nearly two years. Had the plaintiff desired to litigate the question he could have done so without paying the money; even had a deed been made out on the tax certificate it would have been set aside by appropriate proceedings. There was no legal ground for apprehending any danger on the part of the plaintiff. He could have litigated the case as well before as after payment. Neither his person or property was menaced by legal process. Regarding, then, the payment as purely voluntary, it is as certain as any principal of law can be that it could not be recovered back.'

"It seems to us that this case is precisely parallel with the one before us. We are unable to perceive any distinction between them. And as it is the law of Kansas, which we are called upon to administer, the settled decisions of its Supreme Court, upon the very matter are entitled to the highest respect."

The court in that case, as indicated, regarded the question as to whether the payment was under duress or voluntary, one of general law, and as the case had its origin in Kansas, such question was to be determined by the Kansas decisions. So in case at bar, the question being one of general law, and the case having its origin in Oklahoma, the decisions of Oklahoma are to be considered with equal authority upon the question, in this case, as the Kansas decisions were in that case, and as they follow the Kansas cases, it should be determined that the payment in this case was voluntary. In that

case the court at the end of the opinion made the following conclusion:

"In conclusion, our judgment is, that the questions submitted by the Circuit Court must be answered as follows:

"To the first: That judgment should be rendered for the defendant.

"To the second: That the acquisition of the tax certificates and the subsequent payment of the taxes by the plaintiff were a voluntary payment, in such a sense as to defeat the right to recover in this action.

"To the third: That the statute of Kansas referred to in the opinion, does not, upon the facts found, give the plaintiff the right to recover in respect of the causes of action set out in the opinion."

Which conclusions are equally applicable here, and show that the question is one of general law and that the decisions of Oklahoma thereupon and upon the Oklahoma statute should prevail, with the result found in that case.

And the fact that the Indians who paid the taxes protested at the time of payment could not make the payment, under the conditions recited in the petition, an involuntary one further appears from the case of *Union Pac. R. Co.* v. *County Commissioners of Dodge County*, 98 U. S. 541, in which case it appears that certain lands in Nebraska had been taxed under the general taxation and revenue laws of that state, which are very similar to those of Oklahoma, which lands were not subject to taxation, as patent had not issued therefor, the company paid the taxes, protesting at the time in writing, and brought suit to recover the taxes back.

In holding that the taxes were voluntarily paid and could not be recovered back, Mr. Justice Waite says in the opinion:

"We had occasion to consider the same general subject at the last term in the case of *Lamborn* v. *Com'rs.*, * * * which came up on a certificate of division from Kansas. As that was a case from Kansas, we followed the rule adopted by the courts of that state, which is thus stated in *Wabaunsee Co. v. Walker*, 8 Kans. 431:

"'Where a party pays an illegal demand with a full knowledge of all the facts which render such demand illegal, without an immediate and urgent necessity therefor, or unless to release his person or property, such payment must be deemed voluntary and cannot be recovered back. And the fact that the party at the time of making the payment files a written protest does not make the payment involuntary.'"

At the close of the opinion it is further stated:

"Under such circumstances, we cannot hold that the payment was compulsory in such a sense as to give a right to the present action. As the answer to this question disposes of the case, it is necessary to consider the other questions certified. * * *"

Therefore, we contend that the determination of this question of general law by the Supreme Court of Oklahoma, namely, voluntary payment, is broad enough to sustain its judgment, and the consideration of any other questions is unnecessary in this case.

In *Chesborough* v. *United States*, 192 U. S. 253, at 259, it is said:

"The rule is firmly established that taxes voluntarily paid cannot be recovered back, and payments with knowledge and without compulsion are voluntary."
United States v. *New York & Cuba Mail Steamship Company*, 200 U. S. 488.

United States v. *Edmonson*, 181, U. S. 500, to the effect that the payment of an excessive amount for gov-

ernment lands to government officers being voluntary and under mutual mistake of law is not recoverable.

In *Little* v. *Bowers*, 134 U. S. 547, the court quotes and follows *Wabaunsee County* v. *Walker*, 8 Kans. 431, deciding the question of general law that the taxes were voluntarily paid and could not be recovered back, and sustained the motion to dismiss the writ of error.

We, therefore, submit that the case being determined upon a question of general law broad enough to sustain the judgment, and such question having been settled by the Supreme Court of Oklahoma in *Louisiana Realty Co.* v. *City of McAlester*, 25 Okla. 726; *Johnson* v. *Grady County*, 50 Okla. 188, and in *George R. Broadwell* v. *Board of Commissioners of Carter Co.*, 175 Pac. 828, its determination that the taxes were voluntarily paid and cannot be recovered back, presents no federal question for review, and the writ should be dismissed.

POINT III

Even if the Supreme Court of Oklahoma had decided a federal question against the petitioner, C. A. Greenlees, nevertheless the court decided against him also upon independent grounds, not involving any federal question, and broad enough to support the judgment, and for this reason the federal question involved will not be considered by the Supreme Court of the United States.

The first independent ground broad enough to sustain the judgment and not involving any federal question is considered on the first ground to dismiss herein under the first point.

Farson, Son & Co. v. *Bird*, U. S. Sup. Ct. Adv. Op. 1918-1919, page 156.

The second independent ground broad enough to sustain the judgment decided by the state court, and not involving any federal question, is considered in the second ground of the motion to dismiss herein under point two.

And that a decision that a payment of taxes is voluntary and cannot be recovered back is upon independent grounds broad enough to sustain the judgment, and not involving a federal question, we cite:

Garr, Scott & Co. v. *Shannon*, 223 U. S. 468, where in the opinion by Mr. Justice Lamar, it is said:

"It further held that even if there had been merit in plaintiff's contention, it was not entitled to recover the tax for 1905 and 1906, because they had been voluntarily paid.

"If the record offers a basis for sustaining the last proposition, this court cannot consider whether the act violates the 14th Amendment or the Commerce and Contract clause of the Constitution. For, as repeatedly ruled, where a state court has decided against the plaintiff in error on a matter of general law broad enough to sustain the judgment, this court will not consider the federal question, even though they may have been actually decided and determined adversely to his contention. *Hale* v. *Akers*, 132 U. S. 554, 564. The principle has been enforced in cases where the ruling of the state court was based on the application of the doctrine of res judicata, laches, and other similar in kind to that involving the effect of a voluntary payment. *Northern P. R. Co.* v. *Ellis*, 144 U. S. 458; *Hale* v. *Lewis*, 181 U. S. 473; *Moran* v. *Horsky*, 178 U. S. 205; *Pierce* v. *Somerset*, 171 U. S. 648; *Rector* v. *Ashley*, 6 Wall. 142."

We also cite in support of the third ground for dismissal:

Petrie et al. v. *Nampa & Meridian Irr. Dis.*, 39 Sup. Ct. Reporter, 25, where in the opinion by Mr. Justice Clarke it is said:

"But the second ground of the motion to dismiss is valid, viz., that, even if it be conceded that the Supreme Court decided a federal question against the plaintiff in error, nevertheless the court decided against them also upon an independent ground, not involving any federal question and broad enough to support the judgment, and for this reason the federal question involved will not be considered on a writ of error, under a series of decisions of this court extending at least from *Klinger* v. *State of Missouri*, 13 Wall. 257, 263, to *Enterprise Irrigation District et al. v. Farmers' Mutual Canal Co.*, 243 U. S. 157, 164."

Wherefore, in view of all the foregoing, the respondent herein respectfully submits that the writ should be dismissed, and prays that it be so ordered.

Respectfully submitted,

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